Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

GLENN K. JACKSON and ELSIE JACKSON,

*Petitioners,*

*v.*

WEST TELEMARKETING CORPORATION, WEST TELEMARKETING CORPORATION OUTBOUND, STEVEN GARZA, and PROVIDENCE COMMERCIAL REAL ESTATE SERVICES, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The question presented is whether, in a diversity case, transfer of a case based on a forum selection clause is controlled by 28 U.S.C. § 1404(a), which governs transfers for convenience, or section 1406, which governs transfers for improper venue. Even though this Court has ostensibly settled it, the circuit courts are split over this issue. The issue is important because it determines whether the adjudicating district court will apply the substantive law of the transferor forum or the transferee forum. The Fifth Circuit determined that the transfer based on the forum selection clause in this diversity case had to have been determined under 28 U.S.C. § 1406 because the forum selection clause itself rendered California, petitioners' forum of choice, an improper venue. As a result, the Texas federal district court applied a Texas statute of limitations to California residents' claims brought timely in California court regarding confidential bidding information created in California. This decision contradicts precedent from both this Court and other circuits, and deprives petitioners of their right to choose any appropriate venue to bring their lawsuit.

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Appendix D — Per Curiam Order Of The United States Court Of Appeals For The Fifth Circuit Denying Petition For Rehearing Dated And Filed May 2, 2001 ..... 28a

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The magistrate's findings and recommendations (per Kaplan, M.J.) granting respondents' summary judgment motion (Appendix ("Pet. App.") B) are unreported. The district court's judgment (per Kaplan, M.J.) (Pet. App. C) is unreported. The court of appeals' opinion (per Politz, J., joined by Smith and Parker, J.J.) affirming (Pet. App. A) will be, but is not yet, reported. The court of appeals' order denying rehearing (Pet. App. D) is unreported.

## STATEMENT OF JURISDICTION

The court of appeals entered its opinion and judgment on April 4, 2001 and denied rehearing on May 2, 2001. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The provisions of 28 U.S.C. § 1404(a) and 1406(a), as well as the provisions of 28 U.S.C. § 1391 relevant to this petition, are set forth in relevant part as follows:

**28 U.S.C. § 1391(a), (c)**

> (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which

a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

* * *

(c) For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. . . .

**28 U.S.C. § 1404(a)**

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

**28 U.S.C. § 1406(a)**

The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

## STATEMENT OF THE CASE

This dispute arises out of events surrounding the sale of two San Antonio, Texas office buildings known as Woodway Phase IV and Phase I. Petitioners Glenn and Elsie Jackson (collectively Jackson), plaintiffs below, are a husband and wife who reside in California. Respondents, defendants below, are West Telemarketing Corporation, West Telemarketing Corporation Outbound, Steven Garza, and Providence Commercial Real Estate Services, Inc. (collectively called West unless otherwise necessary).

Both the Phase IV and Phase I properties were owned at least in part by Old Stone Federal Savings Bank of Providence, a bank that was placed in receivership in 1993. In June 1993, Jackson purchased a minority interest in the Phase IV property from Broadway National Bank of San Antonio (which was not in receivership). Jackson also attempted to purchase Old Stone's interest in the building through what was supposed to be a confidential bidding process conducted by Old Stone's receiver, the Resolution Trust Corporation. In September 1993, after both Jackson and West had submitted a series of what were supposed to be confidential bids, West was declared the winning bidder and purchased the entire property. Because Jackson owned a minority interest in the building, which was subject to the majority interest's right to sell the entire building at a reasonable price, and because West's offer was apparently reasonable on its face, Jackson signed the contract of sale on Phase IV. Almost a year later, after another bidding process in which both Jackson and West submitted a series of what were supposed to be confidential bids to the RTC, West was also declared the winning bidder on the Phase I property.

In late 1994, Jackson discovered that the Phase I sale had not yet closed. Jackson had offered cash, and believed the deal would have closed by then if West had offered cash as well. Jackson, therefore, submitted a request to RTC for Phase I documents under the Freedom of Information Act in January 1995. At that time, he wondered whether the terms of West's bid on Phase I were really better than his. After Jackson submitted his request, a series of letters were exchanged between him and the RTC, but Jackson never received any information or facts from the RTC pursuant to the request until late April 1997. That was the first time Jackson discovered, or could have discovered, that West had made two "best and final" bids on Phase I, each just a bit better than his own current bids. It was also the first time Jackson had any reason to suspect that his confidential bids on *either property* had been misappropriated by West. The summary-judgment record contains evidence that West did clandestinely acquire Jackson's bid amounts and other bid information, which it used to formulate its own winning bids.

Within months of receiving information from the RTC on his request under the Freedom of Information Act, Jackson filed this lawsuit alleging various causes of action, including unfair competition, unfair trade practices, fraud, and misappropriation of trade secrets. He filed the case against West Telemarketing Outbound in state court in California, where he lived, West does business, and a substantial part of the events underlying his claims arose. The claims were filed within California's statutes of limitations. Discovery revealed compelling evidence that West conspired to and did steal Jackson's bids on both Woodway properties.

Jackson's citizenship was diverse from the citizenship of West; therefore, West removed the case to the United States District Court of the Central District of California. *See* 28 U.S.C. §§ 1332, 1441(a).

West then moved to dismiss the case based upon lack of personal jurisdiction and alternatively to transfer the case to federal court in Texas, citing both 28 U.S.C. §§ 1404(a) and 1406. The factual basis for the motion to transfer was a forum selection clause in the contract of sale on the Phase IV property. The clause provided in relevant part, "In any proceeding involving the transaction contemplated by this Contract, the venue for such proceeding shall be Dallas County, Texas." There was no forum selection clause applicable to the Phase I claims. The California federal court transferred the case to the United States District Court for the Northern District of Texas. The California court stated it was transferring the case "because of the forum selection clause in the parties' agreement," but did not cite the statutory basis for its order.

After the case was transferred, West filed a motion for summary judgment. West argued that Texas choice of law rules and Texas substantive law applied to the case, and that Jackson's tort claims, including his misappropriation of trade secrets claims, were barred by a Texas statute of limitations. The district court applied Texas choice of law rules, and subsequently Texas substantive law, to adjudicate the case in favor of the defendants.

Jackson appealed, arguing *inter alia* that California law, including the longer statute of limitations, should have been applied. On appeal, the Fifth Circuit upheld the district-court decision. The court of appeals held that Texas law applied to the case because the transfer based on the forum selection clause was necessarily governed by 28 U.S.C. § 1406, not section 1404(a). The court wrote:

> [B]y stating only that the transfer was based on "the forum selection clause" the [California] court obviously accepted West's contentions that

> venue in California was improper. As we held in *Tel-Phonic Services, Inc. v. TBS Int'l, Inc.* [975 F.2d 1134 (5th Cir. 1992)], a transfer for improper venue comes under § 1406(a).

The court further concluded that, because the transfer was pursuant to section 1406, Texas's choice of law rules applied, and the district court did not err in ruling that those rules dictated application of Texas substantive law. The court of appeals affirmed the district court's application of the Texas statute of limitations to the tort claims, including the claims for misappropriation of trade secrets.

## REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons. First, the Fifth Circuit's decision conflicts with the holdings of this Court and other circuits. It espouses the legal principle that a valid forum selection clause renders the named forum the only proper venue for a legal dispute, despite the fact that the federal venue statute prescribes other proper venues. That holding is contrary to this Court's decision in *Stewart Organization, Inc. v. Ricoh Corporation*, 487 U.S. 22, 28-32 (1988) and *Stewart's* progeny in other circuits. These authorities hold that valid forum selection clauses do not determine venue, and hence choice of law, but only constitute one factor in the analysis of whether a cause should be transferred for convenience under 28 U.S.C. § 1404(a).

Second, the decision violates important public policy and due process considerations by allowing a transfer between states to result in a change of applicable law. The Fifth Circuit has granted West a "bonus" in the form of a change of law attendant to its change of venue, which has effectively wiped out Jackson's right to redress even though substantial parts of the events underlying the action arose in his chosen venue, West does business in that venue, and the claims were filed timely in that venue.

## I. The Fifth Circuit has contradicted precedent from this Court and other Circuit Courts of Appeals.

### A. This issue was decided in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 28-32 (1988).

This Court in *Stewart* held that in diversity actions a federal trial court's determination whether to transfer venue because of a contractual forum selection clause is governed by 28 U.S.C. § 1404(a). *Stewart* was a diversity case in which the defendant moved to transfer venue under section 1404(a) or dismiss under section 1406 based upon a forum selection clause. The district court ruled that the motion was controlled by state, not federal, law. The court of appeals reversed, holding that federal law controlled the motion, and that the case should be transferred in accordance with the forum selection clause. *Stewart Organization, Inc. v. Ricoh Corp.*, 810 F.2d 1066 (11th Cir. 1987).

This Court affirmed the court of appeals' holding. The Court first stated the threshold issue was whether section 1404(a) controls a request to give effect to a contractual choice of venue. *Id.* The Court then concluded that "federal law, specifically 28 U.S.C. § 1404(a), governs the parties' venue dispute." *Stewart*, 487 U.S. at 28. The Court reasoned that section 1406(a) did not control because the defendant did business in the state in which the lawsuit was originally filed, and thus the state was an appropriate venue under 28 U.S.C. § 1391(c). *Id.* at 28 n.8. The Court went on to discuss how a district court should analyze a motion to transfer under section 1404(a) based upon the existence of a forum selection clause. *Id.* at 29-30.

The important point to be gleaned from *Stewart* relevant to this case is this: a contractual choice of venue does not invalidate

other venues that qualify under 28 U.S.C. § 1391. This point is made abundantly clear by footnote 8 in the *Stewart* majority opinion. Because section 1406 pertains to dismissals and transfers based upon *improper venue*, that statute is inappropriate to enforce a forum selection clause in a diversity case brought in a forum that meets the provisions of the federal venue statute. Section 1404(a), pertaining to transfers for convenience of the parties, governs instead.

### B. Several circuit courts of appeals have correctly construed and followed *Stewart*.

Among the circuit courts of appeals that have followed *Stewart* on this issue are the Second, Third, and Sixth Circuits.

The Third Circuit addressed the issue in *Jumara v. State Farm Ins. Co.*, 55 F.3d 873 (3d Cir. 1995). In *Jumara*, the plaintiffs sued the defendant in federal court based upon diversity of citizenship. The defendant challenged venue based upon the existence of a forum selection clause. The district court ruled that proper venue lay with the state court and dismissed the case.

The court of appeals reversed, concluding that, although the district court disposed of the case under 28 U.S.C. § 1406, the case could not be dismissed pursuant to that provision because venue was actually proper in the federal court action. *Id.* at 875. The court emphasized that venue is governed by federal statute (implying it is not governed by private contract) and then engaged in an analysis of whether venue was proper under the general venue statute, 28 U.S.C. § 1391. The court did so even though neither of the parties had expressly invoked that statute. *Id.* at 877 n.3. The court explained:

> Clearly, venue would be proper in the [transferee court] where the plaintiff resides, the defendant

> transacts business, the contract was signed, and events triggering the dispute occurred. Venue is also proper, however, in [the transferor court], where the defendant transacts business and is therefore subject to personal jurisdiction. *See* 28 U.S.C. § 1391(c) (venue proper in judicial district in which corporation is doing business); *see also Stewart Organization, Inc.*, 487 U.S. at 29 n.8, 108 S. Ct. at 2243 n.8 (The parties do not dispute that the District Court properly denied the motion to dismiss the case for improper venue under 28 U.S.C. § 1406(a) because respondent apparently does business [there].") Since venue is proper in the [transferor court], the district court's effective dismissal of the action constituted an error of law.

*Id.* at 879. The court held, "the district court should instead have invoked 28 U.S.C. § 1404(a), which involves a multi-factor balancing test in which a contractual forum selection clause carries substantial although not dispositive weight." *Id.* at 875; *see also id.* at 879. The court ordered the case transferred to another federal district court under section 1404(a).

The Sixth Circuit interpreted *Stewart* the same way in *Blue Ash Development, Inc. v. Polan*, 1996 U.S. App. LEXIS 1438 (6th Cir. Jan. 2, 1996). That was a diversity case in which the statutory basis for the district court's transfer of the litigation was "not entirely clear from the record" since neither the motion to transfer nor the district court's order made reference to any federal transfer statute. *Id.* at *3. The court of appeals determined, however, citing *Stewart*, that "it is reasonably settled that in diversity actions, a transfer order premised on a contractual forum selection clause will be governed by 28 U.S.C. § 1404." *Id.* The court explained that, "other than

§ 1404, there are no relevant statutory means of transferring the case from one federal district to another." *Id.* at *4. Section 1406 is irrelevant because "It does not appear under [*Stewart*] that a forum selection clause makes the venue 'wrong' " when the action is filed in a district other than that specified in the clause. *Id.* at *4 n.1 (citing *Stewart*, 487 U.S. at 29 n.8; *Jumara*, 55 F.3d at 877-79); *see also First of Michigan Corp. v. Bramlet*, 141 F.3d 260 (6th Cir. 1998).

The Second Circuit has suggested *Stewart* should be similarly construed. *See Jones v. Weibrecht*, 901 F.2d 17, 18 (2d Cir. 1990) (cited in *BRM Industries, Inc. v. CIT Group/ Equipment Financing, Inc.*, 42 F. Supp. 2d 176, 179-80 (D. Conn. 1999)); *see also Licensed Practical Nurses v. Ulysses Cruises, Inc.*, 131 F. Supp. 2d 393, 406 (S.D.N.Y. 2000) (collecting cases); *Maltz v. Union Carbide Marble Care, Inc.*, 992 F. Supp. 286, 295-96 (S.D.N.Y. 1997) (collecting cases); *Huntingdon Engineering & Environmental Inc. v. Platinum Software Corp.*, 882 F. Supp. 54, 57 (W.D.N.Y. 1995); *Micro-Assist, Inc. v. Cherry Communications, Inc.*, 961 F. Supp. 462, 465 (E.D.N.Y. 1997); *Haskel v. The FPR Registry, Inc.*, 862 F. Supp. 909, 915 (E.D.N.Y. 1994). *But see New Moon Shipping Co. v. MAN B&W Diesel AG*, 121 F.3d 24, 28-29 (2d Cir. 1997) (acknowledging confusion that has developed on issue).

Furthermore, although the Fourth Circuit Court of Appeals has not squarely addressed the issue, the district courts within the Fourth Circuit have almost uniformly held that a motion to dismiss for improper venue is not the correct procedural vehicle for enforcing a forum selection clause when transfer is possible. *See BHP International Investment, Inc. v. Online Exchange, Inc.*, 105 F. Supp. 2d 493, 496-97 (E.D. Va. 2000) (collecting cases); *Mead v. Future Medicine Publishing, Inc.*, 1999 U.S. Dist. LEXIS 6720 (M.D.N.C. 1999) (collecting cases).

In short, all these courts have acknowledged and followed what this Court decided in *Stewart*: a forum selection clause does not render an otherwise proper venue improper, and therefore a defendant may not seek to enforce such a clause under 28 U.S.C. § 1406. The appropriate statutory procedural vehicle to use section 1404(a).

### C. The Fifth Circuit has misinterpreted *Stewart*.

In contrast, the Fifth Circuit Court of Appeals has ignored the plain import of *Stewart*. The court of appeals has taken the view that *Stewart* does not prescribe the *only* statutory procedural vehicle by which to challenge the forum based upon a forum selection clause in a diversity case brought in a venue that satisfies 28 U.S.C. § 1391. Pet. App. C at 6. The court opined here that, "*Stewart* does not mandate that whenever a forum selection clause exists any transfer must fall under § 1404(a)." *Id.* The court instead applied section 1406 because West merely alleged that California was an improper venue. Implicit in the court's decision is the conclusion that a forum selection clause renders all venues unspecified in the contract to be improper venues, in contravention of *Stewart* and the federal venue statutes.

The Fifth Circuit relied upon its own opinion in a non-diversity case, *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134 (5th Cir. 1992). Pet. App. C at 7. *Tel-Phonic* also impliedly held that a forum selection clause renders other venues improper for purposes of section 1406. *See also International Software Systems, Inc. v. Amplicon, Inc.*, 77 F.3d 112 (5th Cir. 1996) (upholding dismissal of diversity case based upon forum selection clause, attempting to distinguish *Stewart*, but acknowledging, contrary to the current holding, that *transfers* in diversity cases based upon forum selection clauses fall under section 1404(a)).

The Fifth Circuit has not even acknowledged that the propriety of a particular venue is controlled by federal statute, specifically 28 U.S.C. § 1391, rather than private agreement. Instead, the court of appeals has elevated contractual forum selections to documents that trump legislative enactment. As a matter of law, parties may not render venue improper in a location in which Congress has authorized suit. By act of Congress, a civil action based on diversity of citizenship may be brought in a district that satisfies the requisites of 28 U.S.C. § 1391. No exception is made for cases where the parties have agreed that suit should be brought in another district. *See Licensed Practical Nurses*, 131 F. Supp. 2d at 405.

**D. California was a proper venue for Jackson's claims; therefore, section 1406 is inapplicable, and the motion to transfer was necessarily adjudicated under section 1404(a).**

Venue was clearly proper in the California court.[1] Venue was demonstrated under both 28 U.S.C. § 1391(a)(1), because West was shown to reside there, and section 1391(a)(2), because a substantial part of the events or omissions giving rise to the claims occurred there.

As a corporation, West resides for venue purposes anywhere it is the subject to personal jurisdiction. 28 U.S.C. § 1391(c).[2] The California court rejected West's claim that it

1. Most courts hold that federal venue rights are waived by voluntary removal. 17 Moore's Federal Practice § 111.36[5][a] (Mathew Bender 3d ed.).

2. "West" in this context refers only to West Telemarketing Outbound, which was the sole named defendant at the time of the transfer.

was not subject to personal jurisdiction by declining the only relief sought under that claim, dismissal, and the evidence established the propriety of that decision. West is a telemarketing company, whose solicitation business includes interrupting the dinners of Californians. It actively seeks new clients in California and does hundreds of thousands of dollars of business annually for its existing California clients. It plainly and intentionally avails itself of the privilege of transacting business in California. Its business there is substantial, continuous, and systematic, rendering it subject to jurisdiction under California's long-arm statute, Cal. Code Civ. Proc. § 410.10, which is co-extensive with due process considerations. Venue was, therefore, proper under section 1391(a)(1).

The existence of the forum selection clause in the Phase IV contract did not render venue improper as to the claims on that transaction. As discussed above, venue is rendered proper or improper by the terms of the judicial code, and a private contract does not change the statutes. Under 28 U.S.C. § 1391(a)(2), the test is not where the most contacts to the dispute occurred or even where the most significant events occurred; rather, venue is proper in *any* district where a substantial part of the events or omissions giving rise to the suit occurred. *E.g.*, David D. Siegel, Commentary on 1990 Revision of 28 U.S.C. § 1391(a)(2); *Bates v. C&S Adjusters, Inc.*, 980 F.2d 865 (2d Cir. 1992). That test is met here. The Jacksons live in Southern California, and their stolen confidential bids were created there. The damages from West's torts were visited upon the Jacksons at their home. Further, it was in California that West's agent, Garza, repeatedly communicated with Jackson via phone and letter, enticing him to sign the Phase IV sales contract without disclosure of the fraud resulting in West's winning bid for that project.

Similar facts have been held sufficient to sustain venue under section 1391(a)(2). In *Bates*, the court noted venue is proper at a plaintiffs' residence, where a collection agency has mailed a collection notice or placed a phone call, even when the defendant did not deliberately direct a communication to the plaintiff's district. *Bates*, 980 F.2d at 867-68. When long-distance communications are a part of the claim, as the calls and letters between Jackson and Garza are here, venue will lie at either terminus of the communications, since such communications are as connected to one district as to the other. *E.g., Torchmark Corp. v. Rice*, 945 F. Supp. 172, 179 (E.D. Ark. 1996).

The Fifth Circuit's holding also ignores the critical fact that the forum selection clause pertained only to one of the transactions at issue: the purchase of the Phase IV property. There was no forum selection clause regarding the purchase of the Phase I property. The *only* basis alleged by West for transfer of the Phase I claims was convenience, specifically asserted under section 1404(a). West could not object to the California venue with respect to the Phase I claims based on the forum selection clause.

Because venue was proper in California, section 1406 is inapplicable. It remedies only the situation in which a plaintiff brings a lawsuit in a place that does not qualify as a proper venue under the venue statutes. This Court established that principle in *Stewart*, and the Fifth Circuit has ignored it.

**E. California law should have been applied.**

Jackson, a California resident, filed this suit in a California state court. West removed it to the federal court for the Central District of California. Under the *Erie* doctrine, the California federal court was required to apply California substantive law, like the state court below. *See Erie R. Co. v. Tomkins*, 304

U.S. 64 (1938). Under the *Klaxon* doctrine, the California federal court was required to apply California's choice of law rules, like the state court below. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

The subsequent transfer pursuant to section 1404(a) did not carry with it a change in the applicable law. *Stewart*, 487 U.S. at 32 (citing *Van Dusen v. Barrack*, 376 U.S. 612, 636-37 (1964)). A litigant should not receive "a change of law as a bonus for a change of venue." *Van Dusen*, 376 U.S. at 636. The fairness of this principle becomes abundantly clear when application of the transferee court's statute of limitations would bar the claim. *See, e.g., Ferens v. John Deere Co.*, 494 U.S. 516 (1990); *H.L. Green Co. v. MacMahon*, 312 F.2d 650, 652-53 (2d Cir. 1962), *cert. denied*, 372 U.S. 928 (1963). The Second Circuit long ago summarized the principle:

> Although as a matter of federal policy a case may be transferred to a more convenient part of the system, whatever rights the parties have acquired under state law should be unaffected. The case should remain as it was in all respects but location.
>
> The problem of choice of law following transfer under § 1404(a) has arisen most commonly, as it does in part in the case at bar, when a case which for some reason comes within the federal jurisdiction is governed by a state statute of limitations. Those courts which have considered the problem appear to have been unanimous in their agreement that the statute of limitations of the transferor state should continue to apply.

*Id.* (citations omitted); *see also Headrick v. Atchison, T.& S.F. Ry. Co.*, 182 F.2d 305, 309 (10th Cir. 1950). This has long been the law, and the Fifth Circuit has allowed West to circumvent this

established principle by deeming the transfer to have occurred under section 1406 rather than section 1404(a).

Because venue was proper in the California court, the transfer was as a matter of law made under section 1404, with the result that California remained the forum state. It inexorably follows that California's choice of law doctrines, statutes of limitation, and statutory causes of action should have been applied.

## II. Sound public policy and due process considerations dictate that transfers between states not result in a change of applicable law.

Even under the Fifth Circuit's holdings, Jackson's claims were timely under California law when they were asserted in California state court. Under those circumstances, both private and public interests dictate that a change of venue not result in a change of applicable law.

The private interests clearly weigh in favor of Jackson, especially in the context of summary judgment. He is accused of wrongdoing by nobody, and is twice the victim of unfair competition. He timely filed suit in his home state, seeking redress under the laws of that state, where the stolen bids were formulated and where his injuries occurred. Yet a transfer of venue has wiped out his right to redress under the court of appeals' ruling. Surely due process demands more than that a litigant's claims be extinguished without reference to the merits based on no more than a transfer of venue. U.S. Const. amends. V, XIV.

Federal courts have applied the federal transfer statutes in a way that preserves plaintiffs' claims under similar circumstances. Indeed, this Court long ago interpreted section 1406 to allow a

court to transfer a case, rather than dismiss it, even when plaintiff has filed in a court that does not have personal jurisdiction over the defendant, if a transfer would prevent the plaintiff's claims from being barred by a statute of limitations. *Goldlawr, Inc. v. Heiman*, 369 U.S. 463 (1962). This Court in *Goldlawr* espoused the policy of avoiding "time consuming and justice defeating technicalities" and the dismissal of claims solely because the plaintiff has made a miscalculation on an uncertain and "elusive fact of the kind upon which venue provisions often turn." *Id.* at 466. According to this Court, the legislative purpose of section 1406 is to remove "whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits." *Id. Goldlawr* presented a typical example of the problem section 1406 was enacted to avoid, specifically a plaintiff's losing a substantial part of his cause of action under a statute of limitations merely because he made a mistake in thinking that his chosen venue was appropriate because the defendant transacted business there. *Id.*

This case, too, presents that problem. Jackson reasonably and correctly believed that California was an appropriate forum because West transacted business there, and because a substantial part of the events underlying his claims occurred there. Yet the Fifth Circuit has turned the federal venue statutes on their heads and used them to effect the injustice of extinguishing Jackson's claims even though they were timely filed in his chosen forum. This result is particularly unfair in light of the confusion among the circuit courts over whether a transfer based upon a forum selection clause automatically results in a change of law.

This Court has already expressed its view that, although a case may be transferred to a more convenient part of the system, whatever rights the parties have acquired under state law should be unaffected. The case should remain as it was in all respects

but location. Plaintiffs should retain whatever advantages may flow from the state laws of the forum they have initially selected. The federal venue statutes are simply generalized attempts to promote the goals of convenience and fairness. *Van Dusen*, 376 U.S. at 623; *see also Burnett v. New York Central Ry. Co.*, 380 U.S. 424, 430 (1965). Regardless of what courthouse Jackson's claims are adjudicated in, it is patently unfair to deprive him of the valid cause of action he alleged in California state court, because California was a proper venue under federal statutes.

Public interests also preponderate in favor of Jackson's claim. In modern commerce, business transactions touching many states are commonplace, and many states will therefore have an interest in policing the legitimacy of a given transaction. Here, California has an obvious and important interest in preventing the theft of its citizens' trade secrets and the use of purloined information to cheat its citizens. Nebraska (West's home), Rhode Island (Old Stone's home), and Texas (Garza and Providence's home), also have interests at stake. Each interested state, except Texas, has adopted a version of the Uniform Trade Secrets Act, providing a minimum of three years to bring suit.

Texas now has the same limitations period for trade secret claims. Granted, Texas did not have a three-year limitations period at the time Jackson filed his lawsuit in California. *See generally Computer Assoc. Int'l v. Altai*, 918 S.W.2d 453, 458 (Tex. 1996). However, the Texas legislature abrogated the *Altai* decision by enacting Texas Civil Practice and Remedies Code section 16.010. The statute extended the statute of limitations for misappropriation of trade secrets from two to three years, and expressly stated that the "discovery rule" applies. Section 16.010 became effective on May 1, 1997, and expressly applied to pending untried actions. Act of April 17, 1997, 75th Leg., R.S., ch. 26, § 3, 1997 Tex. Gen. Laws 68 (not codified).

Nevertheless, the Fifth Circuit upheld the district court's ruling that Jackson's misappropriation of trade secrets claims were time barred under Texas law. The Fifth Circuit had previously applied the amended statute under analogous circumstances. *See Seatrax, Inc. v. Sonbeck Int'l, Inc.*, 200 F.3d 358 (5th Cir. 2000). The Court must have concluded in this case, however, that the retroactive application of section 16.010 was unconstitutional under the Texas Constitution. *See Baker Hughes, Inc. v. Keco R&D, Inc.*, 12 S.W.3d 1 (Tex. 1999) (holding retroactive application of section 16.010 unconstitutional because defendants had vested right in expiration of limitations before amendment became effective). The effect of the Fifth Circuit's conclusion in this case is absurd: Jackson's claims were timely under California law when he filed them and timely under Texas law when they were transferred, yet a Nebraska citizen somehow has a vested right under the Texas Constitution to avoid the California claims.

The court of appeals applied outdated Texas law, apparently on the basis that Texas is the location of the properties and the residence of some of the defendants. Yet the location of the property is immaterial to the claims at issue — no title or ownership interests are implicated here, and Texas's special interests in its own territory are therefore inapplicable. While the residence of defendants is an important consideration, it should be less so in a multi-state transaction. Texans should not expect to be insulated by Texas law when they steal trade secrets in another state, using them to deceive in yet a third state.

So, what is the policy reason for extinguishing Jackson's claims? The court of appeals has not provided a reason. The policy underlying statutes of limitation, preventing stale claims, is inapplicable here for the simple reason that the claims were timely when and where filed. Only the court of appeals' decision

that the transfer was effected under an inapplicable statute and the erroneous application of superceded Texas law created the limitations bar. This is wrong, contrary to the public interests of all the states involved, and unjustified by the private interest in this case. The court of appeals' decision takes away legitimate claims without due process, in contravention of this Court's precedent.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision below reversed.

Respectfully submitted,

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# APPENDIX

## APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED APRIL 4, 2001

## UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 99-11378

GLENN K. JACKSON; ELSIE JACKSON,

Plaintiffs-Appellants,

versus

WEST TELEMARKETING CORPORATION OUTBOUND, A Delaware Corporation; DOES 1-10, inclusive; WEST TELEMARKETING CORPORATION, A Delaware Corporation; STEVEN GARZA; PROVIDENCE COMMERCIAL REAL ESTATE SERVICES, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas

Before POLITZ, SMITH and PARKER, Circuit Judges.

POLITZ, Circuit Judge:

Glenn and Elsie Jackson appeal an adverse summary judgment in their action alleging bid-rigging through fraud, conspiracy, and misappropriation. Concluding that the statute of limitations bars their tort claims and that they presented no genuine issues of material fact pertaining to the claim for fraud, we affirm.

*Appendix A*

## BACKGROUND

The Jacksons, residents of California, desired to purchase office buildings in San Antonio, Texas, known as Woodway Phase I and Phase IV. Old Stone Federal Savings Bank foreclosed on the properties in 1992. The Resolution Trust Corporation, as receiver for Old Stone, owned a 69.23% interest therein. Broadway National Bank of San Antonio owned the remaining 30.77%, which it sold to the Jacksons for $680,000, subject to Old Stone's right of first refusal. After obtaining financing from Broadway, the Jacksons offered $1.5 million to Old Stone for its interest in Phase IV. This bid was increased to $1,592,290 — 69.23% of the $2.3 million asking price. An Old Stone employee handled the sales process.

West Telemarketing Corporation, a Delaware corporation with its principal place of business in Nebraska, also expressed an interest in Phase IV, appointing an agent to assist in its purchase efforts. The Old Stone employee handling the sale informed West's agent that a $2.3 million dollar bid "would not be eliminated because of price." The very next day, after the Jacksons refused an offer by West to purchase the interest acquired from Broadway, West submitted a bid for $2.5 million, with brokerage fees to be paid by West.[1] The Old Stone employee recommended the offer to the RTC, Broadway, and Jackson. In accord with the Participation Agreement between Old Stone and Broadway, all parties consented and the sale was finalized on September 23, 1993.

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1. The Jacksons assert that this was the first time West included brokerage fees in its offer, and that it did so only after its agent learned of similar terms in their offer.

Similar events transpired the following year when Old Stone sold Phase I. The RTC wrote to the parties asking them to submit their "best and final offers." On the morning of the deadline, West offered to purchase Phase I for $2.9 million. The Jacksons bid $3.1 million. West's agent called to inquire "how our offer looked," and the Old Stone employee responded by giving the agent "some range of numbers that the [other] offers fell within." West's agent sent a revised offer for $3.2 million. The RTC accepted West's bid and the parties entered into a purchase agreement on February 5, 1995.

In August of 1997, the Jacksons filed suit in California state court alleging various types of unfair competition, fraud and deceit, tortious interference with contract, misappropriation, and conversion. Appellees removed to federal court based on diversity jurisdiction and then successfully moved to transfer the case to Texas urging lack of personal jurisdiction, improper venue, or, in the alternative, for convenience of the parties. The appealed motion for summary judgment was then filed and was granted by the Magistrate Judge. This appeal followed.

## ANALYSIS

We review *de novo* a trial court's grant of summary judgment.[2] The Jacksons challenge the court *à quo*'s use of the Texas choice of law rules and the subsequent application of Texas substantive law. Also challenged is the entry of summary judgment both with respect to the statute of limitations on the tort claims and the lack of evidence of fraud.

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2. *Threadgill v. Prudential Securities Group, Inc.*, 145 F.3d 286 (5th Cir. 1998).

*Appendix A*

## I. Applicable Law

### A. *Choice of Law Rules*

The Jacksons first contend that the trial court erred in applying Texas' choice of law rules. In determining the appropriate substantive law, the court looked to the Texas choice of law rules because a federal court exercising diversity jurisdiction typically applies the choice of law rules of the forum state.[3] The instant action is a bit more complex, however, because of the transfer from California, the "original" forum state. The Jacksons assert that the California district court transferred the matter under 28 U.S.C. § 1404(a) and that such transfers do not change the state law applicable to a diversity case.[4] West counters that the court issued the transfer under § 1406(a) because venue was improper in California.[5]

The federal court in California ordered the transfer "because of the forum selection clause in the parties' agreement."[6] We

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3. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941).

4. *See Ferens v. John Deere Co.*, 494 U.S. 516 (1990).

5. *See Tel-Phonic Services, Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134 (5th Cir. 1992) (holding that transfers for improper venue pursuant to § 1406(a) require that the transferee court apply the law of the transferee state).

6. West's motion requesting the transfer referenced the forum-selection clause in the purchase agreement for Phase IV. Section 9.4 of the Phase IV Agreement provided: "In any proceeding involving the transaction contemplated by this Contract, the venue for such proceeding shall be Dallas County, Texas."

recognize that in *Stewart Organization, Inc. v. Ricoh Corp.*,[7] the Supreme Court questioned "whether § 1404(a) itself controls respondent's request to give effect to the parties' contractual choice of venue and transfer this case to a Manhattan court."[8] Answering that inquiry in the affirmative, they stated that "Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.' "[9] On close review we conclude that the *Stewart* case does not control the present dispute for three reasons.

Initially, while the Jacksons urged application of California law to the Texas district court, they never disputed West's assertions that the Texas choice of law rules applied. Had they urged that California choice of law rules were applicable because the California court transferred under § 1404(a), the Texas district court quite likely would have underscored the reasons for the transfer. Their assertion, for the first time advanced on appeal, that *Stewart* requires application of California law because of a claimed transfer under § 1404(a) is not persuasive.

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7. 487 U.S. 22 (1988).

8. *Id.* at 29.

9. *Id.* (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964)). The court also noted that "[a] motion to transfer under § 1404(a) thus calls on the district court to weigh in the balance a number of case-specific factors. The presence of a forum-selection clause such as the parties entered into in this case will be a significant factor that figures centrally in the district court's calculus." *Id.*

In addition, *Stewart* discusses the devices a trial court may employ to transfer an action when one party urges same based on a forum selection clause. The Court found that § 1404(a) is *an* appropriate vehicle for such a transfer because it allows for an individualized assessment of fairness and convenience, with a forum selection clause being *one* factor for consideration. *Stewart* does not mandate that whenever a forum selection clause exists any transfer must fall under § 1404(a).

Finally, although the transfer order referenced neither § 1404(a) nor § 1406(a), the record provides valuable insight into the statutory basis for transfer. West's motion requested dismissal or transfer under § 1406(a), or, in the alternative, transfer under § 1404(a) for the convenience of the parties. West's memorandum in support of a transfer under § 1406(a) focuses exclusively on the forum selection clause, asserting that by designating Texas as the forum, venue in California was improper. In contrast, when requesting transfer under § 1404(a), West presented a detailed analysis of the traditional factors evaluated when considering a transfer for convenience. Nothing in the record indicates that the court transferred the case for "convenience and fairness," which would implicate the reasoning and holding in *Stewart*. To the contrary, by stating only that the transfer was based on "the forum selection clause" the court obviously accepted West's contentions that venue in California was improper.[10] As we held in *Tel-Phonic Services, Inc. v. TBS Int'l, Inc.*,[11] a transfer for improper venue comes under § 1406(a).

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10. We note that the Jackson memorandum in opposition only attacked the validity of the forum selection clause. Jackson alleged fraud in the procurement of the Purchase Agreement, including the forum selection clause, but never provided the district court with any affirmative reasons justifying venue in California.

11. 975 F.2d 1134 (5th Cir. 1992).

Having determined that the California court transferred the case under § 1406(a), we conclude that the Magistrate Judge correctly applied Texas choice of law principles. In *Ellis v. Great Southwestern Corp.*,[12] we addressed the choice of law principles applicable to transfers based on § 1404(a) and § 1406(a) and opined: "Accordingly, we conclude, as have the majority of authorities that have considered this question, that following a transfer under § 1406(a), the transferee district court should apply its own state law rather than the state law of the transferor district court."[13]

B. *Substantive Law*

The Jacksons also challenge the application of Texas rather than California substantive law. We find no error in the trial court's analysis of Texas choice of law rules. Texas adheres to the most significant relationship test for both contract and tort cases.[14] Although the number of contacts is relevant, the qualitative nature of the contacts controls.[15] The real property at issue herein is in San Antonio, Texas. West's principal place of business is in Texas. The parties executed the contracts for sale in Texas and included a choice of law provision requiring application of Texas law. The only contact with California is that the Jacksons reside there. Virtually all of the relevant conduct occurred in Texas which undeniably

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12. 646 F.2d 1099 (5th Cir. 1981).

13. *Id.* at 1109.

14. *See Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242 (5th Cir. 1990).

15. *Id.* at 249 (citing *Gutierrez v. Collins*, 583 S.W.2d 312, 319 (Tex. 1979)).

bears the most significant relationship to the subject matter. There is no error in the Magistrate Judge's application of Texas law.

II. **Statute of Limitations**

The trial court found that the statute of limitations barred the tort claims, even if the discovery rule extended the time for the filing thereof. We find no error in the findings and the subsequent entry of summary judgment on this issue.

Under Texas law, claims for unfair competition, unfair trade practices, conversion, tortious interference with contract, misappropriation of trade secrets, and conspiracy must be brought within two years from the time the cause of action accrues.[16] In general, a cause of action accrues and limitations begin running when a wrongful act causes a legal injury.[17] The discovery rule, however, "defers accrual of certain causes of action until the plaintiff knew, or exercising reasonable diligence, should have known of the wrongful act causing injury."[18]

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16. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon Supp. 1999) (conversion); TEX. BUS. & COMM. CODE ANN. § 17.565 (Vernon 1997) (unfair trade practices under Texas law); *Computer Associates Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex. 1996) (applying two-year statute of limitations in § 16.003(a) to misappropriation of trade secrets); *First Nat'l Bank of Eagle Pass v. Levine*, 721 S.W.2d 287, 289 (Tex. 1986) (unfair competition and tortious interference with contract); *Nelson v. American Bank of Gonzales*, 921 S.W.2d 411, 415 (Tex. App. 1996) (applying two-year statute of limitations in § 16.003 to claims for civil conspiracy).

17. *S.V. v. R.V.*, 933 S.W.2d 1 (Tex. 1996).

18. *Salinas v. Gary Pools, Inc.*, 31 S.W.3d 333, 335 (Tex. App. 2000) (citing *Advent Trust Co. v. Hyder*, 12 S.W.3d 534, 538 (Tex. App. – San Antonio 1999, pet. denied)).

The discovery rule affords protection in only limited instances,[19] applying in (1) cases of fraudulent concealment; and (2) when the nature of the injury is inherently undiscoverable and the injury itself is objectively verifiable.[20]

Appellees successfully met their summary judgment burden by establishing that the applicable statute of limitations bars each of the asserted tort claims. These claims revolve around the assertion that appellees misappropriated confidential information allowing West to out-bid Jackson unfairly for the Phase I and Phase IV properties. As in the Findings and Recommendation of the Magistrate Judge, we assume *arguendo* that the discovery rule applies to the facts at issue. Accordingly, the two-year statute of limitation began running when Jackson knew, or exercising reasonable diligence should have known of defendants alleged unlawful obtaining of confidential information.

Glenn Jackson acknowledges that after Old Stone rejected his Phase I bid he contacted the RTC to express concerns over whether his bid had received fair treatment. He also submitted a Freedom of Information Act request on January 6, 1995, asking about West's bids, the contracted purchase price, and the terms and conditions thereof. The RTC refused this request[21] but

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19. *HECI Exploration Co. v. Neel*, 982 S.W.2d 881 (Tex. 1998).

20. *S.V.*, 933 S.W.2d at 6 (citing *Computer Associates International, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 456 (Tex. 1996)).

21. Under the FOIA, federal agencies may withhold "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4).

informed Jackson that he could obtain information on closed asset sales from the Dallas Field Office Public Service Center. Jackson appealed to the RTC's General Counsel on March 8, 1995, and also included a demand for information on the Phase IV property, noting that the sale on that building already had closed.

It should be manifest that by March of 1995, Glenn Jackson suspected the unlawful behavior underlying their present claims. They now maintain that their suspicions related only to the treatment of their bid by the RTC, not any wrongdoing by West. We are not persuaded. The Jackson letters and requests regarding both the Phase I and Phase IV projects reflect knowledge of sufficient facts to cause a reasonably prudent person to investigate further, thereby discovering any cause of action against West. We therefore affirm the entry of summary judgment with respect to the Jacksons' tort claims.

## III. **Fraud Claim**

The Jacksons also challenge the grant of summary judgment with respect to their claim for fraud. The trial court found a lack of sufficient evidence to proceed with this fraud action. In order to prove fraud, the Jacksons must establish: (1) a material misrepresentation; (2) that was false; (3) known to be false when made or asserted without knowledge of its truth; (4) made with intent that they would act on it; (5) that they actually did rely on it; and (6) that it caused injury.[22] This claim rests on concealment rather than on affirmative statements. "Absent a fiduciary or

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22. *Formosa Plastics Corp. USA v. Presidio Engineers and Contractors, Inc.*, 960 S.W.2d 41 (Tex. 1998) (quoting *Sears Roebuck & Co. v. Meadows*, 877 S.W.2d 281 (Tex. 1994)).

confidential relationship, the failure to disclose information is not actionable as fraud."[23]

The Jacksons did not establish a genuine issue of material fact with respect to the claim for fraud. Any alleged fiduciary duty owed to them by Old Stone extends to its own conduct but does not encompass any acts of West, the party named in the Jacksons' action. As noted by the trial judge, the duty of good faith and fair dealing does not impose upon one party the burden of placing the interests of the other party ahead of their own, as would be the case in a fiduciary relationship.[24] The Jacksons sued West, not RTC or Old Stone. Nothing in the record before us provides any justification for imposing upon West a fiduciary duty to disclose its dealings with Old Stone. No genuine issue of fact exists regarding the fraud claim and summary judgment thereon was appropriate.

The judgment appealed is AFFIRMED.

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23. *See Mitchell Energy Corp. v. Samson Resources Co.*, 80 F.3d 976, 985 (5th Cir. 1996) (citing *Tempo Tamers, Inc. v. Crow-Houston Four, Ltd.*, 715 S.W.2d 658, 669 (Tex. App. – Dallas 1986, writ ref'd n.r.e.)).

24. *Crim Truck & Tractor Co. v. Navistar Int'l Transportation Corp.*, 823 S.W.2d 591, 594 (Tex. 1992).

**APPENDIX B — FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION DATED AND FILED NOVEMBER 17, 1999**

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NO. 3-98-CV-0960-L

GLENN K. JACKSON, ET AL.

Plaintiffs,

VS.

WEST TELEMARKETING CORPORATION
OUTBOUND, ET AL.

Defendants.

**FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE**

Defendants West Telemarketing Corporation Outbound, West Telemarketing Corporation, Steven Garza, and Providence Commercial Real Estate Services, Inc. have filed: (1) a motion to compel the application of Texas law; and (2) a motion for summary judgment. Both motions have been referred to United Stares Magistrate Judge Jeff Kaplan for recommendation pursuant to 28 U.S.C. § 636(b).

*Appendix B*

**I.**

This lawsuit arises out of the sale of two office buildings in San Antonio, Texas, known as Woodway Park Phases I & IV. On June 5, 1993, Plaintiff Glenn Jackson learned that the Resolution Trust Corporation was offering the Phase IV property for sale at a list price of $2.3 million. (Plf. App. at 343, 350). The RTC, as receiver for Old Stone Federal Savings Bank, owned a 69.23% interest in the building.[1] The remaining 30.77% was owned by Broadway National Bank. On June 16, 1993, plaintiff offered to purchase Broadway's interest in the property for $680.000. (*Id.* at 315-18). Broadway accepted this offer subject to Old Stone's right of first refusal. (*Id.* at 323). At the same time, Broadway agreed to provide up to $1.5 million in financing so plaintiff could buy out Old Stone. (*Id.* at 361-62). On July 23, 1993, plaintiff offered to purchase Old Stone's interest in Phase IV for $1.5 million. (*Id.* at 363-68). He later increased his offer to $1,592,290 — exactly 69.23% of the $2.3 million asking price. (*Id.* at 401-04, 966-67).

Meanwhile, West Telemarketing Corporation also expressed an interest in purchasing the Phase IV property.[2] On August 15, 1993, real estate broker Steven Garza called the RTC on behalf of West. Garza's notes from this conversation indicate that Kathie Christian, the RTC representative who was handling the bidding

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1. Old Stone Bank was placed into receivership just prior to or during the Phase IV negotiations.

2. West was the largest tenant in the Woodway Park Office complex and had made several unsuccessful offers to purchase the property in 1992 and 1993. (Plf. App. at 271-82, 283-85, 287-88, 299-302).

process, told him that "$2.2 wouldn't be high enough, $2.3 won't be eliminated b/c of price." (*Id.* at 416, 916-17).[3] Christian also stared that she would try to help Garza because she "doesn't like the way the other guy [plaintiff] did things." (*Id.* at 416). The next day, West offered to buy Phase IV for $2.5 million. (*Id.* at 424-25). Christian recommended the offer to the RTC, Broadway, and plaintiff. (*Id.* at 431). All parties consented and the sale was finalized on September 23, 1993. (*Id.* at 768-70, 999-1000; Def. App. at 74-134).

Plaintiff and West also made competing bids on the Phase I property. (Plf. App. at 460-62, 463-69,485). On July 18, 1994, the RTC wrote to the parties and invited them to submit their "best and final offers." (*Id.* at 470-72). Garza called Christian in response to this letter. He allegedly was told that "someone put a stupid offer in to leverage West on a lease or a flip." (*Id.* at 483). Plaintiff believes that this comment refers to his initial offer, which allowed him to assign the purchase contract. (*Id.* at 468). On August 11, 1994, West offered to purchase Phase I for $2.9 million. (*Id.* at 487-88). That same day, plaintiff submitted a bid for $3.1 million. (*Id.* at 489). When Garza telephoned Christian regarding his bid, she expressed disappointment with his offer. (*Id.* at 884-85). Garza asked "how our offer looked in relation to the others that she might have received." (*Id.* at 888). Christian responded by giving him "some range of numbers that the offers fell within." (*Id.*). Garza immediately sent a revised

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3. Plaintiff alleges that Christian also disclosed other material terms of his offer, such as the fact that no commission would be paid on his deal with Broadway Bank. (Plf. Response at 9). Although Garza's notes suggest that he knew about this aspect of the offer, he was unable to explain the entry at his deposition. (Plf. App. at 416, 915-16).

offer for $3.2 million. (*Id.* at 490-91, 886-87). This bid was accepted by the RTC, and the parties entered into a purchase agreement on February 5, 1995. (Def. App. at 150-197).

Plaintiff suspects that the RTC may have divulged confidential information to West and its broker which was used to formulate their successful bids on the Phase I & IV properties. On August 12, 1997, plaintiff filed suit in California state court for: (1) unfair competition; (2) unfair trade practices; (3) fraud; (4) breach of express and implied contract; (5) *quantum valebant*; (6) conversion; (7) conspiracy to breach fiduciary duty; (8) tortious interference with contract; (9) misappropriation of trade secrets; (10) unjust enrichment; (11) spoliation of evidence; and (12) violations of the Texas Real Estate Commission Act.[4] The case was timely removed to federal court and subsequently transferred to the Northern District of Texas. Defendants now move to compel the application of Texas law and for summary judgment. Both motions have been fully briefed by the parties and are ripe for determination.

## II.

The threshold issue in this case involves choice of law. Plaintiff contends that all his claims are governed by California law. Defendants maintain that Texas law applies.

A federal court sitting in diversity must apply the choice-of-law rules of the forum state. *Klaxon Co. v. Stentor Electric*

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4. Plaintiff concedes that he has no cause of action under the Texas Real Estate Commission Act or for spoliation of evidence. (Plf. Response at 39-40). Accordingly, defendants are entitled to summary judgment as to these claims.

*Manufacturing Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 1021, 85 L.Ed. 1477 (1941); *In re Air Disaster at Ramstein Air Base, Germany*, 81 F.3d 570, 576 (5th Cir.), *cert. denied*, 117 S.Ct. 583 (1996). Texas has adopted the "most significant relationship" test in both contract and tort cases. *Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242, 249 (5th Cir. 1990), *citing Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420-21 (Tex. 1984). In a contract case, the court must consider: (1) the place of the contract; (2) the place where the contract was negotiated; and (3) the location of the subject matter of the contract. *Maxus Exploration Co. v. Moran Bróthers, Inc.*, 817 S.W.2d 50, 53 (Tex. 1991), *citing* RESTATEMENT (SECOND) CONFLICT OF LAWS § 188 (1971). In a tort case, the court must consider: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; and (3) the place where the relationship between the parties is centered. *CPS International, Inc. v. Dresser Industries, Inc.*, 911 S.W.2d 18, 29 (Tex. App. — El Paso 1995, writ denied), *citing* RESTATEMENT (SECOND) CONFLICT OF LAWS § 145 (1971). The domicile, residence, nationality, place of incorporation, and place of business of the parties are relevant considerations in both types of cases. *Maxus Exploration*, 817 S.W.2d at 53; *CPS International*, 911 S.W.2d at 19. The number of contacts with a particular state is not outcome determinative. Rather, the selection of applicable law depends on the qualitative nature of the contacts. *See Mitchell*, 913 F.2d at 249, *citing Gutierrez v. Collins*, 583 S.W.2d 312, 319 (Tex. 1979).

Clearly, Texas has the most significant relationship to the claims alleged by plaintiff. The subject matter of this lawsuit is a commercial office building located in San Antonio, Texas. Plaintiff alleges that the RTC disclosed confidential information which

was used by defendants to bid on the property. This information was obtained through a series of telephone conversations initiated by Steven Garza in Texas to Kathie Christian in Rhode Island. Three of the four defendants are either domiciled or have their principal place of business in Texas. The mere fact that plaintiff lives in California is insufficient to make the law of that state applicable.

Plaintiff also sues for breach of contract. This claim implicates the indemnification clause of the purchase agreement between Old Stone Federal Savings Bank and Broadway National Bank. While plaintiff acknowledges that the agreement expressly provides for the application of Texas law, he attempts to avoid this provision by arguing that he was fraudulently induced into signing the contract. (Plf. App. at 310, ¶ 13). This argument is unavailing. Claims of fraudulent inducement are determined by the same law that governs the contract. *See Tel-Phonic Services, Inc. v. TBS International, Inc.*, 975 F.2d 1134, 1142 (5th Cir. 1992), *citing* RESTATEMENT (SECOND) CONFLICT OF LAWS § 201. cmt. a (1971) ("Questions involving the effect of misrepresentation, duress, undue influence and mistake upon a contract are determined by the law chosen by the parties, if they have made an effective choice.").

The Court concludes mat Texas is the state with the most significant relationship to this litigation. Defendants' motion to compel the application of Texas law should be granted.

**III.**

Defendants also move for summary judgment. Their arguments can be grouped into two broad categories: (1) most

of the state tort claims are barred by limitations; and (2) there is no evidence to support any of the claims alleged by plaintiff.

**A.**

Summary judgment is proper when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A dispute is "genuine" if the issue could be resolved in favor of either party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *Thurman v. Sears, Roebuck & Co.*, 952 F.2d 128, 131 (5th Cir.), *cert. denied*, 113 S.Ct. 136 (1992). A fact is "material" if it might reasonably affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *Matter of Gleasman*, 933 F.2d 1277, 1281 (5th Cir. 1991).

A movant who does not have the burden of proof at trial must point to the absence of a genuine fact issue. *Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 312 (5th Cir. 1995); *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995). Conversely, a movant who has the burden of proof at trial must conclusively establish the essential elements of his claim or affirmative defense. *See Brenham Community Protective Association v. United States Department of Agriculture*, 893 F.Supp. 665, 668 (W.D. Tex. 1995). Once the movant meets this initial burden, the non-movant must show that summary judgment is not proper. *Duckett v. City of Cedar Park*, 950 F.2d 272, 276 (5th Cir. 1992). This may be done by rendering depositions, affidavits, and other competent evidence. *Topalian*

*v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, 113 S.Ct. 82 (1992). All such evidence must be viewed in the light most favorable to the party opposing the motion. *Rosado v. Deters*, 5 F.3d 119, 122 (5th Cir. 1993). However, conclusory statements and testimony based on conjecture or subjective belief are not competent summary judgment evidence. *Topalian*, 945 F.2d at 1131.

**B.**

Defendants argue that plaintiff's claims for unfair competition, unfair trade practices, conversion, tortious interference with contract, misappropriation of trade secrets, conspiracy, unjust enrichment, and *quantum valebant* are barred by limitations. Under Texas law, each of these claims must be brought within two years from the time the cause of action accrues. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon Supp. 1999) (conversion); TEX. BUS. & COMM. CODE ANN. § 17.565 (Vernon 1997) (willful trade practices)[5]; *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 885 (Tex. 1998) (unjust enrichment); *Computer Associates International, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex. 1996) (misappropriation of trade secrets); *First National Bank of Eagle Pass v. Levine*, 721 S.W.2d 287, 289 (Tex. 1986) (unfair competition and tortious interference); *Nelson v. American National Bank of Gonzales*, 921 S.W.2d 411, 415 (Tex. App. — Corpus Christi 1996, no writ) (conspiracy). Plaintiff maintains that these claims are not

5. Plaintiff brings his unfair trade practices claim under Section 17200, *et seq.* of the California Business and Professions Code. The most analogous cause of action under Texas law is for deceptive trade practices under Section 17.41, *et seq.* of the Texas Business and Commerce Code.

time-barred because he did not learn that defendants misappropriated his confidential bid information until April 1997. (Plf. App. at 1150).

Even assuming *arguendo* that the discovery rule applies to these claims, they are still barred by limitations. The discovery rule tolls the limitations period until the plaintiff knows or should have known "of such facts as would cause a reasonably prudent person to make an inquiry that would lead to discovery of the cause of action. *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387, 404 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 1286 (1999), *quoting Hoover v. Gregory*, 835 S.W.2d 668, 671 (Tex. App. — Dallas 1992, writ denied); *see also J.M. Huber Corp. v. Positive Action Tool of Ohio Co.*, 879 F.Supp. 705, 708 (S.D. Tex. 1995) ("If a party has a reasonable basis to suspect wrongdoing, that party is obligated to exercise diligence to discover whether wrongdoing has in fact occurred."). After his bid on the Phase I property was rejected, plaintiff wrote the RTC to express his "concern as to whether or not my proposal was fairly judged." (Def. App. at 198-99). He asked for all information regarding West's bids for the property, including "a copy of the initial offer received from West Telemarketing, any additional supplemental offers, along with all documents which disclose the current contracted purchase price, as well as all of the terms and conditions associated therewith." (*Id.*). The RTC initially refused this request because the sale had not been finalized.[6] However,

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6. Plaintiff requested this information under the Freedom of Information Act, 5 U.S.C. § 552. However, the FOIA permits federal agencies to withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The RTC cited this exemption in refusing to provide the requested information on the Phase IV sale.

plaintiff was told that information on closed asset sales was available directly from the Dallas Field Office Public Service Center. (*Id.* at 200-201). He was further advised that "[c]losing of the sale is expected no later than March 30, 1995." (*Id.*).

Plaintiff appealed this decision to the RTC's General Counsel on March 8, 1995. In his letter, plaintiff wrote:

> [I]t has taken almost seven months to complete the transaction. There is no way the process should have taken that long on an all cash proposal, and one can only assume there is some financing involved either through or arranged by the RTC or an outside lender. *The interest monies lost by the RTC created by the delay most certainly is evident that this writer's offer was, in fact, the best of the final offer.*"

(*Id.* at 203) (emphasis added). Plaintiff also demanded "full and complete information" on the Phase IV property, since that sale had already closed. (*Id.*).

It is clear that plaintiff suspected improprieties in connection with the sale of the Phase I & IV properties at least by March 1995. He openly questioned whether the seven-month delay in consummating the Phase I sale was evident that his offer was "the best of the final offer." His request for information about the Phase IV transaction suggests that he was also suspicious of that deal. The fact that plaintiff did not know the exact details of the alleged scheme is irrelevant. *See Winters*, 149 F.3d at 404; *Humphrey v. J.B. Land Co.*, 478 F.Supp. 770, 772 (S.D. Tex. 1979). Moreover, plaintiff was told that he could obtain

information on the Phase I sale after it closed from the Dallas Field Office. He knew that the Phase IV transaction had already been finalized. However, there is no evidence that plaintiff ever contacted the Dallas Field Office to obtain the information he sought.

The Court concludes that plaintiff knew or should have known "of such facts as would cause a reasonably prudent person to make an inquiry that would lead to the discovery of [his] cause of action" more than two years before this suit was filed. Accordingly, these tort claims are barred by limitations.

C.

Plaintiff also sues for fraud and breach of express and implied contract.[7] Defendants contend that there is no evidence to support these claims.

1.

The elements of fraud under Texas law are "a material misrepresentation, which was false, and which was either known to be false when made or was asserted without knowledge of its truth, which was intended to be acted upon, which was relied upon, and which caused injury." *Formosa Plastics Corp. USA v. Presidio Engineers and Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998), *quoting Sears, Roebuck & Co. v. Meadows*, 877 S.W.2d 281, 282 (Tex. 1994). Significantly, plaintiff does

7. These claims are governed by a four year statute of limitations. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.004 (Vernon 1986) (breach of contract); *Williams v. Kholaf*, 802 S.W.2d 651, 656-58 (Tex. 1990) (fraud).

not allege that defendants *affirmatively misrepresented* material facts concerning the Phase I & IV sales. Rather, he argues that they *concealed* information from him. (Plf. Third Am. Complaint ¶¶ 37, 39-40, 56, 57). This is fatal to his fraud claim unless plaintiff can establish a fiduciary or confidential relationship between the parties. *Mitchell Energy Corp. v. Samson Resources Co.*, 80 F.3d 976, 985 (5th Cir. 1996), *citing Tempo Tamers, Inc. v. Crow-Houston Four, Ltd.*, 715 S.W.2d 658, 669 (Tex. App. — Dallas 1986, writ ref'd n.r.e.).

Plaintiff maintains that Old Stone Bank owed him a duty "to deal fairly, confidentially, and in good faith by virtue of the RTC rules that required fairness, confidentiality, good faith and no preferential treatment." (Plf. Response at 26). The argument fails for at least two reasons. First, neither Old Stone nor the RTC are parties to this writ. There is no evidence that West, Garza, or Providence Commercial Real Estate owed any fiduciary duty to plaintiff. Moreover, the RTC rules do not create a fiduciary relationship. The Texas Supreme Court has held that "[t]he duty of good faith and fair dealing merely requires the parties to 'deal fairly' with one another and does not encompass the often more onerous burden that requires a party to place the interest of the other party before his own, often attributed to a fiduciary duty." *Crim Truck & Tractor Co. v. Navistar International Transportation Corp.*, 823 S.W.2d 591, 594 (Tex. 1992). Although parties to a contract may trust one another to perform their obligations thereunder, they generally are free to pursue their own interests. *Id.* at 594-95.

For these reasons, plaintiff cannot maintain a cause of action for fraud. Defendants are entitled to summary judgment as to this claim.

Plaintiff further alleges that West breached its agreement to indemnify him against losses arising out of the Phase IV transaction. (Plf. Third Am. Complaint ¶¶ 90-93). Section 7.4 of the purchase contract provides, in relevant part:

> Buyer hereby agrees to indemnify, protect, defend, save and hold harmless Seller, and Seller's employees, officers, directors, representatives, attorneys and agents from and against any and all debts, duties, obligations, liabilities, suits, claims, demands, causes of action, damages, losses, costs and expenses . . . asserted or incurred *at any time after the closing date* in any way relating to, connected with, or arising out of the property or the ownership, leasing, use, operation, maintenance and management thereof.

(Def. App. at 90, § 7.4) (emphasis added). The gravaman of this lawsuit involves alleged improprieties in the bidding process which occurred *before* the Phase IV sale was closed. Therefore, the indemnity provision is inapplicable on its face. Although plaintiff argues that defendants concealed their misdeeds after the date of closing, he fails to cite any evidence to that effect.[8] Defendants' motion for summary judgment should be granted as to this claim.

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8. The Court is not required to comb through the 1,153-page appendix submitted by plaintiff in order to ferret out evidence to support his claim. *Ahrens v. Perot Systems Corp.*, 39 F.Supp.2d 773, 782 n.24 (N.D. Tex. 1999) (Lindsay, J.).

Finally, plaintiff contends that there was an "implied contract" between the parties to deal fairly with one another and not misappropriate confidential bid information. (Plf. Third Am. Complaint ¶¶ 63-65). An essential element to such a claim is the mutual intent to enter into a binding contract. *See Haws & Garrett General Contractor, Inc. v. Gorbett Brothers Welding Co.*, 480 S.W.2d 601, 609 (Tex. 1972). Here, there is no evidence of any agreement relating to the bidding process. To the contrary, Garza told plaintiff that "West's objective is to own Woodway Park Phase IV, gaining full control over its San Antonio facilities." (Plf. App. at 432). It is ludicrous to suggest that two of the competitors for this project agree to deal fairly with one another.

## RECOMMENDATION

There are no genuine issues of material fact and defendants are entitled to judgment as a matter of law. Defendants' motion for judgment should be granted in its entirety.

DATED: November 17, 1999.

s/ Jeff Kaplan
JEFF KAPLAN
UNITED STATES MAGISTRATE
JUDGE

**APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION DATED AND FILED NOVEMBER 19, 1999**

**IN THE UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

NO. 3-98-CV-0960-L

**GLENN K. JACKSON, ET AL.**

**Plaintiffs,**

**VS.**

**WEST TELEMARKETING CORPORATION OUTBOUND, ET AL.**

**Defendants.**

**JUDGMENT**

On November 17, 1999, the magistrate judge made findings and recommendations on defendants' motion for summary judgment. The next day, the parties filed a written consent to proceed before the magistrate judge pursuant to 28 U.S.C. § 636(c). The case was transferred to the docket of Magistrate Judge Jeff Kaplan "for the conduct of all further proceedings and the entry of judgment" on November 18, 1999.

For the reasons stated in the findings and recommendation of the magistrate judge dated November 11, 1999, defendants'

motion for summary judgment is granted. Plaintiffs' claims against Defendant West Telemarketing Corporation Outbound, West Telemarketing Corporation, Steven Garza, and Providence Commercial Real Estate Services, Inc. are dismissed with prejudice. All costs of court are taxed against plaintiffs.

**SO ORDERED.**

DATED: November 19, 1999.

s/ Jeff Kaplan
JEFF KAPLAN
UNITED STATES MAGISTRATE
JUDGE

**APPENDIX D — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MAY 2, 2001**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-11378

GLENN K. JACKSON; ELSIE JACKSON,

Plaintiffs – Appellants

v.

WEST TELEMARKETING CORPORATION OUTBOUND, A Delaware Corporation; DOES 1-10, inclusive; WEST TELEMARKETING CORPORATION, A Delaware Corporation; STEVEN GARZA; PROVIDENCE COMMERCIAL REAL ESTATE SERVICES INC

Defendants – Appellees

Appeal from the United States District Court for the Northern District of Texas, Dallas

**ON PETITION FOR REHEARING**

Before POLITZ, SMITH and PARKER, Circuit Judges.

*Appendix D*

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

s/ Henry A. Politz
United States Circuit Judge

Supreme Court, U.S.
FILED
SEP 14 2001
CLERK

No. 01-167

In The

# Supreme Court of the United States

GLENN K. JACKSON and ELSIE JACKSON,

*Petitioners,*

v.

WEST TELEMARKETING CORPORATION, WEST TELEMARKETING CORPORATION OUTBOUND, STEVEN GARZA and PROVIDENCE COMMERCIAL REAL ESTATE SERVICES, INC.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

The primary question presented is one of waiver. Petitioners have raised choice of law challenges in this Court that were not raised in the district court and do not warrant consideration now.

In addition, this case addresses settled questions of federal civil procedure; specifically, the Fifth Circuit's decision turns on the application of time-worn choice of law standards following the transfer of venue under either 28 U.S.C. § 1404(a) or § 1406 pursuant to a forum selection clause. Because of the unusual procedural posture below, however, and because of Petitioners' failure to raise this issue until appeal to the Fifth Circuit, no court has ever decided whether venue was proper where the case was originally filed. Nor has any court addressed whether retaining the transferor court as the forum would be independently improper as to the later-added defendants, where it is undisputed the transferor court would not have had personal jurisdiction over them. The Fifth Circuit opinion recognizes and correctly recites the applicable general law regarding § 1404(a) versus § 1406 transfers, then resolves the case correctly in light of the case-specific, unique record before it. That case-specific holding does not conflict with any decision of this Court or any other Circuit.

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## BRIEF IN OPPOSITION

Respondents respectfully urge this Court to deny the petition for a writ of certiorari, which seeks review of a judgment of the United States Court of Appeals for the Fifth Circuit.

## STATEMENT OF THE CASE

This action arises out of the sale of two office buildings in San Antonio, Texas, known as Woodway Park Phases I and IV. On June 5, 1993, Petitioners Glenn and Elsie Jackson ("Jackson") learned that the Resolution Trust Corporation (the "RTC") was offering the Phase IV property for sale at a list price of $2.3 million. The RTC, as receiver for Old Stone Federal Savings Bank ("Old Stone"), owned about a 70% interest in the building. The remaining interest was owned by Broadway National Bank ("Broadway"), a San Antonio bank.

On June 16, 1993, Jackson offered to purchase Broadway's interest in Phase IV for $680,000. Broadway accepted the offer subject to Old Stone's right of first refusal. At the same time, Broadway agreed to provide up to $1.5 million in financing so that Jackson could purchase Old Stone's interest in Phase IV as well. Jackson offered to purchase Old Stone's interest in Phase IV for about $1.5 million.

Meanwhile, Respondent West Telemarketing Corporation ("West Corp.") also expressed an interest in purchasing Phase IV. Respondent West Telemarketing

Corporation Outbound ("West Outbound") was the largest tenant in the Woodway Park office complex and had tried to purchase the property previously. On August 15, 1993, real estate broker Respondent Steve Garza called the RTC on behalf of West Corp. Attempting to negotiate the highest possible sales price for the property, Kathie Christian ("Christian"), the RTC representative handling the bidding process, told Garza that "$2.2 wouldn't be high enough, $2.3 won't be eliminated because of price." The next day West Corp. offered to buy Phase IV for $2.5 million. Christian recommended the offer to the RTC, Broadway, and Jackson (who, as purchaser of Broadway's interest, had to consent to any sale of Old Stone's interest). All parties consented and the sale closed on September 23, 1993.

Jackson and West Outbound made competing bids the next year on Phase I. On July 18, 1994, the RTC wrote to the parties and invited them to submit their "best and final offers." On August 11, 1994, West Outbound offered to purchase Phase I for $2.9 million, while Jackson submitted a bid for $3.1 million. Garza asked Christian "how our offer looked in relation to the others that she might have received." Christian gave him "some range of numbers that the offers fell within." Garza sent a revised offer on behalf of West Outbound for $3.2 million. West Outbound's bid was accepted by the RTC.

Soon after losing out on the Phase I purchase, Jackson began to question the propriety of the bidding process. On January 6, 1995, Jackson sent a formal Freedom of Information Act ("FOIA") request to the RTC for information regarding West Outbound in particular and the bidding process in general. The FOIA request explained

the facts and timelines of both sales transactions, specifically comparing Jackson's bids to West Outbound's, then stated: "I do have a concern as to whether or not my proposal was fairly judged, especially based on the delays incurred." Jackson then made clear that he questioned the process that resulted in West Outbound being the successful bidder: he requested "any other document, *including but not limited to, phone communication log* which may relate to the final decision to select West-Telemarketing as the buyer." Jackson, an attorney, submitted the FOIA request on his law firm's letterhead. The fact that Jackson requested telephone logs of communications between the RTC and West Outbound indicated that he already suspected that there had been some improper contact between the two that resulted in West Outbound being the successful bidder.

The RTC responded to Jackson's FOIA request on February 27, 1995. Because the Phase I sale had not yet closed, the RTC invoked certain exceptions to the FOIA and declined to produce any documents at that time. The response stated, however, that closing on the sale of Phase I between the RTC and West Outbound "is expected no later than March 30, 1995," and after that date information "on all closed sales for the states of Texas, Louisiana and Mississippi is publicly available through the Dallas Field Office Public Service Center."

Jackson appealed the initial FOIA request to the RTC's general counsel by letter dated March 8, 1995, demanding "full and complete information" on the Phase IV property, since that sale had already closed by the date of the appeal. Jackson never contacted the Dallas Field

Office Public Service Center, however, to secure further information regarding either transaction.

On August 12, 1997, more than two years after questioning the propriety of the bidding process to the RTC and more than two years after all of the information involving the Phase I and Phase IV sales became publicly available in the RTC Dallas Field Office, Jackson sued only West Outbound in California state court. Jackson did not sue the other Respondents – West Corp., Garza, or Garza's real estate agency, Providence – at that time. West Outbound removed the action to federal court in California based on diversity of citizenship, then moved to dismiss the case or transfer it to Texas based on lack of personal jurisdiction, improper venue, or in the alternative, convenience of the parties and witnesses. The California federal court did not rule on the personal jurisdiction challenge, but transferred the case to Texas "because of the forum selection clause in the parties' agreement." After the case was transferred to Texas, Jackson added the additional Respondents as defendants.

Respondents moved for a determination that Texas substantive law and limitations periods applied in this diversity case. Respondents argued that Texas choice of law rules applied because Texas was the forum state. Jackson did not dispute that Texas was the forum state and that Texas choice of law rules should apply, but argued that, under Texas choice of law rules, California substantive law – and its limitations period for statutory claims – should apply. Among other factors considered in the choice-of-law analysis is the fact that the parties' agreement included not only a forum selection clause, but also chose Texas law to govern any dispute.

Analyzing Texas choice of law rules, the court held that Texas substantive law applied, then granted summary judgment that Jackson's claims were barred by limitations or failed for lack of evidence as a matter of law. *See* Petitioners' Appendix B at ¶ II (determining that Texas substantive law applies by analyzing Texas choice of law principles).

## REASONS FOR DENYING THE WRIT

This Court should deny the petition because the Fifth Circuit correctly recited the applicable law and based its specific holding on the anomalous procedural posture of this case caused by Jackson's failure to raise the choice of law issue in the district courts. The Fifth Circuit correctly recited the general rule that 28 U.S.C. § 1404(a), not state law, governs a federal court's "individualized, case-by-case consideration of convenience and fairness" in enforcing a contractual forum selection clause. Petitioners' Appendix A at 5a, *citing Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988). The Fifth Circuit held that the general rule in *Stewart* did not resolve the precise choice of law issue under the facts of this case, however, because: (1) Jackson never raised the § 1404(a) versus § 1406 issue below so no court had determined whether venue was proper in California to begin with; (2) *Stewart* itself notes that its holding is premised on a determination that the original venue was proper; and (3) the specific record in this case indicated that the transfer to Texas was likely intended to be based on § 1406 rather than § 1404(a) because of improper venue in California.

Where, as here, the original forum was improper, transfer is pursuant to § 1406, not § 1404(a).

As a policy matter, the Fifth Circuit's holding will not encourage forum shopping, but is rather the only means to avoid improper forum shopping. Where a plaintiff chooses a proper forum to begin with, the Fifth Circuit opinion gives deference to that choice. It would be very poor policy indeed to allow a party to file suit in any state at all, no matter how unrelated to the parties or the subject matter of the suit, and then have that state's choice of law principles govern the case forever, wherever transferred.

As an equitable matter, Jackson has not been deprived of valid claims by an improper procedural device. Even if the summary judgment on limitations grounds were reversed, judgment in Respondents' favor was still proper and should be affirmed on substantive grounds.

## I. Jackson waived the contention that California should be the forum state.

Jackson's claim before this Court is that the transfer from California to Texas was done pursuant to § 1404(a), so California should remain the forum state, and California choice of law principles should apply. Jackson did not raise that issue before either the California district court or the Texas district court following transfer. *See, Martin v. Stokes*, 623 F.2d 469, 474-475 (6th Cir. 1980) (holding that transferee court should decide whether there was personal jurisdiction in transferor court when deciding which state's choice of law principles to apply). To the

contrary, Jackson neither contested that Texas was the forum state nor disputed that Texas choice of law principles applied.

The first time Jackson ever claimed that California should be considered the forum state and its choice of law principles should apply was in the Brief of Appellants to the Fifth Circuit. As such, the issue is waived. *See Hormel v. Helvering*, 312 U.S. 552, 556 (1941) ("Ordinarily an appellate court does not give consideration to issues not raised below."); *Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Ctrs., Inc.*, 200 F.3d 307, 316-17 (5th Cir. 2000) ("It is a bedrock principle of appellate review that claims raised for the first time on appeal will not be considered."). *See also Reynolds v. American-Amicable Life Ins. Co.*, 591 F.2d 343, 344 (5th Cir. 1979) (finding waiver of choice of law issue where case "was tried on the assumption that Texas law governed and it is only on appeal that appellant argues the applicability of South Carolina law").

As a purely procedural matter, therefore, this Court should deny the petition because the sole issue presented has been waived.

## II. Even using California choice of law principles, Texas law and limitations periods would have applied.

Even if California should have remained the forum state and its choice of law principles applied, Texas substantive law would still have been applied to the claims,

and summary judgment would have been proper on limitations grounds. California's longer statutes of limitations would not automatically have applied simply because California's choice of law principles were used. Rather, California's choice of law principles would have been analyzed to determine what state's substantive law should apply, and the limitations period of that state would govern. *Industrial Indem. Co. v. Chapman and Cutler*, 22 F.3d 1346, 1350-1352 (5th Cir. 1994) (California remained the forum after § 1404 transfer to Texas, and California choice of law principles applied to determine what state's limitations period applied).

Even under California choice of law principles, Texas law and its limitations periods would have applied here. First, the parties agreed that Texas law would govern any disputes arising out of the transaction. Second, Texas has a greater interest in having its law applied to this dispute than California does. Among other things, Jackson sought to rescind the sale by the RTC to West Outbound and recover title to the real property at issue, which is located in Texas. In addition to the substantial relation between Texas and the facts of this suit, Texas has a significant interest in having its law applied to suits involving title to real property within the state.

## III. The Fifth Circuit did not contradict any other case from any other court.

### A. This Court's general rule in *Stewart* is inapplicable where venue is improper to begin with.

This Court has held that, where suit is filed originally in a proper venue, a subsequent transfer pursuant to a

contractual forum selection clause is governed by § 1404(a). *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988). *Stewart* did not, however, even imply that § 1404(a) controls when the original venue was improper. To the contrary, *Stewart* expressly distinguished such a situation, which would be governed by § 1406.

The precise issue presented in *Stewart* was whether federal courts sitting in diversity should enforce forum selection clauses based on state law or federal law, and if under federal law, what should be the standard. The Court held that federal law, not state law, should govern the inquiry, but disagreed with the Eleventh Circuit as to which federal law should apply. The Eleventh Circuit had held that the district court should analyze the forum selection clause according to the standards set out in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) (holding that federal courts sitting in admiralty generally should enforce forum selection clauses absent a showing that to do so "would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.").

This Court held, instead, that the federal courts should analyze forum selection clauses pursuant to § 1404(a), which allows the court to weigh the transfer decision "according to an individualized, case-by-case consideration of convenience and fairness." *Stewart*, 487 U.S. at 29. The *Stewart* Court noted that the "flexible and individualized analysis Congress prescribed in § 1404(a) thus encompasses consideration of the parties' private expression of their venue preferences." *Id.* at 29-30.

The *Stewart* Court made it clear, however, that venue was proper to begin with, and thus § 1406 did not control: "The parties do not dispute that the District Court properly denied the motion to dismiss the case for improper venue under 28 U.S.C. § 1406(a)." *Stewart*, 487 U.S. at 29 n. 8. Thus, *Stewart* did not hold, as Jackson implies, that any transfer of venue whenever a forum selection clause exists is necessarily a § 1404(a) transfer. The holding in *Stewart* thus controls only when venue was proper to begin with, but the district court determines that various factors, including the parties' contractual selection of a different forum, weigh in favor of a transfer to some other proper venue.

### B. Transfers from an improper venue are properly governed by § 1406.

This Court has previously held that, when venue is transferred pursuant to § 1404(a), the state in which the transferor court sits remains the "forum," and the transferee court will apply the choice of law principles of that state. *Van Dusen v. Barrack*, 376 U.S. 612, 636 (1964) (transfer in diversity case requested by defendant); *Ferens v. John Deere Co.*, 494 U.S. 514, 529-530 (1990) (transfer in diversity case requested by plaintiff). This Court has never held, however, that when a transfer is made pursuant to § 1406 because venue is improper, the transferor court remains the forum. That has never been the law.

The Fifth Circuit and many other circuits agree that the transferee state becomes the forum if the original venue selected by the plaintiff was improper. "Following a section 1406(a) transfer, regardless of which party

requested the transfer or the purpose behind the transfer, the transferee court must apply the choice of law rules of the state in which it sits." *Tel-Phonic Services, Inc. v. TBS Intern., Inc.*, 975 F.2d 1134, 1141 (5th Cir. 1992), *citing Ellis v. Great Southwestern Corp.*, 646 F.2d 1099, 1110 (5th Cir. Unit A June 1981). *See also Trierweiler v. Croxton and Trench Holding Corp.*, 90 F.3d 1523, 1532 (10th Cir. 1996); *Adam v. J.B. Hunt Transport, Inc.*, 130 F.3d 219, 229 (6th Cir. 1997); *Wisland v. Admiral Beverage Corp.*, 119 F.3d 733, 735 (8th Cir. 1997), *cert. denied*, 522 U.S. 1112 (1998); 15 Charles A. Wright, et al., FEDERAL PRACTICE AND PROCEDURE § 3827 (1986) ("[W]henever the original venue is improper . . . the transferee court should apply whatever law it would have applied had the action been properly commenced there.").

This rule makes sense. The Eighth Circuit explained that applying the law of the transferee state to § 1406 transfers from improper venues is the only way to avoid forum shopping: "If the law of the transferor court were applied, a plaintiff could deliberately file in a jurisdiction with favorable law but clearly improper venue and benefit from its choice." *Wisland*, 119 F.3d at 735. Such a rule is also consistent with *Stewart*, which expressly noted that venue was proper where suit was originally filed. *Stewart*, 487 U.S. at 29 n. 8.

The general rule does not change simply because there is a forum selection clause involved. Venue in the original court is proper or not based on the applicable venue statute. Any forum selection clause would only become relevant upon the district court's analysis of whether or not to transfer a case, and if so where to send it. For example, if venue were proper to begin with, then

a district court could weigh a forum selection clause and other considerations to decide whether to transfer a case "in the interest of fairness" under § 1404(a). That was the scenario in *Stewart*. In that instance, the transferor court would remain the forum, and its choice of law principles would apply. If, however, venue was not proper where the plaintiff originally filed suit, a district court pursuant to § 1406 could dismiss the case or transfer it to the forum selected by the parties. *See Tel-Phonic*, 975 F.2d at 1141 n. 7 (explaining that venue was "improper" in the transferring court under applicable venue statute, and particular transferee court was selected "because of a forum selection clause").

Thus, a transfer involving a forum selection clause is neither *ipso facto* a § 1404(a) transfer nor a § 1406 transfer. Whether it is governed by § 1404(a) or § 1406 depends on whether venue was proper to begin with. If venue is improper in the original forum, then such a transfer is governed under § 1406, and choice of law principles from the transferee court apply. As will be discussed more fully below, venue was improper in this case because West Outbound was not subject to personal jurisdiction in California.

### C. The Fifth Circuit opinion does not conflict with *Stewart*.

The Fifth Circuit opinion is entirely consistent with *Stewart* and the general rules, discussed above, regarding transfers of venue. The court first correctly recited the general rule from *Stewart* that § 1404(a) "is intended to place discretion in the district court to adjudicate motions

for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.' " Petitioners' Appendix A at 5a. The court then determined that *Stewart* did not answer the precise issue presented, for three case-specific reasons.

First, the Fifth Circuit discussed the procedural history and noted that Jackson did not raise the issue in the district court, and never disputed that Texas choice of law rules applied. If Jackson had raised the issue before the district court, that court could have clarified the grounds for the transfer, and confirmed whether the transfer was made pursuant to § 1404(a) or § 1406. Appendix A at 5a.

Then, the Fifth Circuit correctly noted that *Stewart* did not hold, as Jackson implies, that any transfer where there is a forum selection clause is *ipso facto* a transfer under § 1404(a): "*Stewart* does not mandate that whenever a forum selection clause exists any transfer must fall under § 1404(a)." Appendix A at 6a. The court thus correctly recognizes that *Stewart* is limited to cases where venue was proper to begin with.

Finally, the Fifth Circuit discussed the specific facts and arguments made by each side in this specific record, noting that "the record provides valuable insight into the statutory basis for the transfer." The court concluded that "the [district] court obviously accepted West's contentions that venue in California was improper" and noted correctly that a "transfer for improper venue comes under § 1406(a)." Appendix A at 6a.

Thus, the Fifth Circuit opinion is consistent with *Stewart*, but simply concluded that, in this case, *Stewart* did not answer the question. Because this case involved a

situation where venue was alleged to be improper, the court properly recognized that the inquiry involved a different analysis. The Fifth Circuit did not hold, as Jackson claims, that the forum selection clause, by itself, rendered venue improper in California. It did not decline to follow *Stewart* or announce a split with other circuits involving the proper analysis of the *Stewart* rule. The Fifth Circuit discussed the particular facts of the case, concluded that the district court likely agreed that venue was improper in California, and made the transfer pursuant to § 1406.

The Fifth Circuit also properly relied upon its previous decision in *Tel-Phonic*, 975 F.2d 1134, which held that a transfer from an improper venue is accomplished under § 1406, not § 1404(a). The *Tel-Phonic* court did not, as Jackson claims, base its decision that venue was improper on the existence of a forum selection clause. Rather, the court there made clear that the transfer was pursuant to § 1406 because venue was improper substantively: the sole basis for venue where suit was filed – a venue provision in the RICO statute – was inapplicable because the RICO claim was dismissed. *Tel-Phonic*, 975 F.2d at 1141 n. 7. The court then selected the transferee court based on the forum selection clause. *Id.* The *Tel-Phonic* court expressly distinguished its holding from a situation where venue is proper originally, but is transferred pursuant to § 1404(a) according to a forum selection clause. *Id.* Jackson thus misrepresents the express analysis of *Tel-Phonic* when claiming that the court there "held that a forum selection clause renders other venues improper for purposes of section 1406." Petition at 11.

### D. There is no conflict between the Fifth Circuit opinion and any other case.

Jackson argues that the Fifth Circuit opinion conflicts with *Stewart* and opinions from other circuits. The cases discussed, however, are consistent with the general rules set out above: (1) where venue is proper to begin with, transfer pursuant to a forum selection clause is governed by § 1404(a); (2) where venue is transferred under § 1404(a), the transferor court remains the forum; (3) where venue is transferred under § 1406, the transferee court becomes the forum; and (4) existence of a forum selection clause does not make a transfer *ipso facto* either a § 1404(a) transfer or a § 1406 transfer.

For example, the court in *Blue Ash Development, Inc. v. Polan*, 74 F.3d 1240, 1996 WL 1828 (6th Cir. 1996), noted that § 1406 provides for transfer or dismissal "when a case is brought where venue is initially 'wrong,' " and explained that *Stewart* "suggests that § 1406(a) applies mainly to situations when the action is initially brought in a division or district where the *statutory* requirements for venue (28 U.S.C. § 1391) have not been met." (court's emphasis). 1996 WL 1828 at *1 n. 1. The *Blue Ash* court thus agreed with the Fifth Circuit's conclusion that § 1406 governs when suit is originally filed in an improper forum.

Similarly, the court in *Jumara v. State Farm Ins. Co.*, 55 F.3d 873 (3rd Cir. 1995), described the general rule consistent with the Fifth Circuit opinion below:

> Section 1404(a) provides for the transfer of a case where both the original and the requested venue are proper. Section 1406, on the other

> hand, applies where the original venue is improper and provides for either transfer or dismissal of the case.

*Jumara*, 55 F.3d at 878. The court then correctly noted that in "order to decide which statute should have governed the district court's transfer order in this case, therefore, we must first determine whether venue was proper" where suit was originally filed. *Id.* As in *Blue Ash*, that statement of the general law in *Jumara* recognizes that § 1406 governs venue transfers when venue is improper to begin with and is thus entirely consistent with the Fifth Circuit opinion. There is no conflict here.

## IV. California was not a proper forum because there was no personal jurisdiction over West Outbound in California.

### A. Personal jurisdiction is the operative standard for determining whether California was a proper forum as to West Outbound.

As is discussed above, a transfer of venue from one federal court to another is accomplished pursuant to § 1406, and the choice of law principles of the transferee state apply, if the original venue was improper. Under 28 U.S.C. § 1391(a), venue is proper where any defendant resides (§ 1391(a)(1)), or where "a substantial part of the events or omissions giving rise to the claim occurred" (§ 1391(a)(2)). If venue is based on § 1391(a)(2), the law of the transferee state applies if there was no personal jurisdiction over the defendant in the transferor state, even if venue was proper. Stated another way, if venue is proper but personal jurisdiction is lacking where suit is originally filed, the choice of law principles of the transferee

state apply. *See*, Charles A. Wright, FEDERAL PRACTICE AND PROCEDURE, § 3827. Thus, only if West Outbound was subject to personal jurisdiction in California could California remain the forum state after transfer to Texas.

### B. West Outbound has very limited contacts with California.

As a starting point, it is important to emphasize that the California district court never expressly ruled on West Outbound's personal jurisdiction challenge. The court in California transferred the case to federal court in Dallas, the forum selected by the parties in their forum selection clause, but made no ruling regarding personal jurisdiction. Jackson claims that the court must have overruled the personal jurisdiction challenge, because it declined the only relief sought regarding personal jurisdiction: dismissal. Petition at 13. The court's action, however, is just as consistent with a determination that there was no personal jurisdiction, and a decision to transfer the case to Dallas rather than dismiss it. Indeed, Jackson argued that such a decision to transfer under § 1406 to a proper venue rather than dismiss a case where there is no personal jurisdiction reflects sound public policy. Petition at 16-17, *discussing Goldlawr, Inc. v. Heiman*, 369 U.S. 463 (1962) (permitting transfer to proper venue when personal jurisdiction lacking).

Though there is no express ruling below regarding personal jurisdiction, the record indicates very strongly that the California court lacked either general or specific personal jurisdiction over West Outbound, and California

was thus an improper forum. Regarding West Outbound's general contacts with California, the record shows that West Outbound has never owned nor leased property in California; has never had an office in California; has never had employees, officers, or directors in California; has never had local telephone listings in California; has never had a mail box or mailing address in California; has never collected sales tax in California nor paid any taxes there; has never advertised in any indigenous media in California; has never been qualified to do business in California and has never had a registered agent for service there. Though West Outbound did make telemarketing calls to California residents during the relevant time period, its invoices to California residents totaled just 0.005% of its revenue in 1993, 0.56% of its revenue in 1994, and 0.37% of its revenue for 1995.

Regarding specific jurisdiction, the record established that the claims against West Outbound did not arise out of its telemarketing contacts. The only contacts by West Outbound to California relating to the subject matter of this suit were: (1) a single letter from Garza in Texas to Jackson in California informing him that West Outbound sought to purchase Phase IV and therefore rejecting Jackson's offer that West Outbound settle for being a tenant instead; (2) two telephone calls between Jackson in California and Garza in Texas relating to Phase IV, at least one of which was initiated by Jackson. There was no communication between Jackson and Garza at all regarding Phase I. The actual record thus belies the contention that Garza "repeatedly communicated with Jackson via phone and letter." Petition at 13.

### C. There was no general jurisdiction over West Outbound in California.

The question presented is whether West Outbound is subject to personal jurisdiction in California. The appropriate court to answer that question would have been the federal district court in California. Thus, the law of the Ninth Circuit interpreting the California long-arm statute is instructive.

#### 1. West Outbound's contacts with California are not substantial.

The Ninth Circuit has explained that only if a non-resident's activities within a state are "substantial" or "continuous and systematic," is there "a sufficient relationship between the defendant and the state to support jurisdiction even if the cause of action is unrelated to the defendant's forum activities." *Scott v. Breeland*, 792 S.W.2d 925, 927 (9th Cir. 1986); *Data Disc, Inc. v. Systems Technology Assoc.*, 557 F.2d 1280, 1285 (9th Cir. 1977). The plaintiff bears the burden of establishing that jurisdiction exists. *Id.*

The Ninth Circuit has previously held that contacts akin to West Outbound's are not sufficiently "substantial" or "continuous and systematic" to support personal jurisdiction. For example, in one case the court held that a non-resident defendant's use of a sales agent in California to solicit sales orders, order samples, recommend additional sales agents, promote products and attend trade shows, and promote sales of the defendant's products through the mail and a showroom display were

insufficient contacts to establish general personal jurisdiction. *Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240, 1241-42 (9th Cir. 1984). The Ninth Circuit further rejected the exercise of personal jurisdiction over a cruise line where its contacts with the forum state were "limited to advertising in the local media, the mailing of brochures and the payment of commissions to travel agents, the conducting of promotional seminars, and the sale of its vacation cruises to residents of Washington. Only 1.29% and 1.06% of Carnival's cruise business was derived from residents of Washington in 1985 and 1986, respectively." *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 381 (9th Cir. 1988), *rev'd on other grounds*, 499 U.S. 588 (1991). The Ninth Circuit also rejected exercise of general jurisdiction over the music group, The Oak Ridge Boys, who gave periodic concerts in California and regularly distributed their music through California record stores. *Scott*, 792 F.2d at 927.

**2. It would not be reasonable to subject West Outbound to jurisdiction in California.**

Independent of sufficient contacts with California, exercise of personal jurisdiction comports with due process only if it is reasonable and comports with fair play and substantial justice. The Ninth Circuit has articulated seven factors to weigh in determining such reasonableness:

> (1) the extent of the defendants' purposeful interjection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of the conflict with the sovereignty of the defendants' state; (4) the

> forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.

*Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1487-1488 (9th Cir. 1993). Analysis of the factors weighs against maintaining jurisdiction over West Outbound in California.

The first factor weighs significantly in West Outbound's favor, given its very limited contacts with California: "the smaller the element of purposeful interjection, the less is jurisdiction to be anticipated and the less reasonable is its exercise." *Core-Vent*, 11 F.3d at 1488; *Ins. Co. of North America v. Marina Salina Cruz*, 649 F.2d 1266, 1271 (9th Cir. 1981). *See also Corporate Invest. Brokers v. Melcher*, 824 F.2d 786, 787 (9th Cir. 1987) (explaining that even if "there is sufficient 'interjection' into the state to satisfy the [purposeful availment prong], the degree of interjection is a factor to be weighed in assessing the overall reasonableness of jurisdiction under the [reasonableness prong]").

The second and sixth factors weigh the relative burdens on plaintiff and defendant, and the Ninth Circuit has made clear that the interests and convenience of the defendant are of "primary concern." *Pacific Atlantic Trading Co. v. M/V Main Exp.*, 758 F.2d 1325 (9th Cir. 1985); *FDIC v. British-American Ins. Co.*, 828 F.2d 1439, 1444 (9th Cir. 1987) (explaining that "the primary concern is for the defendant's burden"). Thus, those factors in the main favor West Outbound.

The third factor – the extent of conflict with the sovereignty of the defendant's state – weighs in West Outbound's favor. To the extent there is any conflict between the laws of Texas and California, the parties have contractually already chosen Texas law.

The fourth factor, the interest of the forum, favors Jackson in that California has an interest in adjudicating the claims of its residents. The fifth factor, the most efficient forum, favors West Outbound. Most of the witnesses and documents are in Texas, not California, and the real property at issue is in Texas. The seventh factor, the availability of another forum, weighs in West Outbound's favor. Not only does Jackson bear "the burden of proving the unavailability of an alternative forum," *Roth Garcia Marquez*, 942 F.2d 617, 624 (9th Cir. 1991), but the parties actually contracted to select another forum: Dallas, Texas.

It is clear, then, that the Ninth Circuit interprets the California long-arm statute and the limits of due process as requiring substantial contact with the forum state: something more than five one-hundredths of a percent of a non-resident defendant's business. Viewed against that standard, which Jackson does not even attempt to discuss, West Outbound's contacts with California are not sufficient to establish general personal jurisdiction.

### D. There is no specific jurisdiction over West Outbound in California.

The Ninth Circuit has articulated a three-part test to determine whether there is specific jurisdiction over a non-resident defendant:

> (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or results from the defendant's forum-related activities; and (3) exercise of jurisdiction must be reasonable.

*Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 269 (9th Cir. 1995). *See also Garcia Marquez*, 942 F.2d at 620-621 (9th Cir. 1991).

The "purposeful availment" test is not a facile one. "In order to have purposefully availed oneself of conducting activities in the forum, the defendant must have performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state." *Garcia Marquez*, 942 F.2d at 621, *quoting Sinatra v. National Enquirer*, 854 F.2d 1191, 1195 (9th Cir. 1988). "This purposeful availment requirement ensures that the defendant is not haled into a jurisdiction as a result of random, fortuitous or attenuated contacts, or on account of unilateral activity of another party or third person." *Garcia Marquez*, 942 F.2d at 621, *quoting Burger King v. Rudzewicz*, 471 U.S. 462, 475 (1985).

West Outbound's only contacts with California relating to the claims here were two telephone conversations and a letter, mostly initiated by Jackson. At least one telephone call was initiated unilaterally by Jackson to Garza in Texas, calling to suggest that West Outbound not compete with Jackson to purchase Phase IV but rather

allow Jackson to purchase the property and be a tenant only. The letter was West Outbound's response rejecting Jackson's suggestion. West Outbound's core activities relating to the transaction at issue consisted of negotiations with an RTC representative in Rhode Island and a banker in Texas to purchase real property in Texas. West Outbound's contacts with California were thus attenuated and based primarily on the unilateral activity of Jackson, and do not meet the standard of "purposeful availment."

The reasonableness of specific jurisdiction is measured by the same test as for general jurisdiction. *See Garcia Marquez*, 942 F.2d at 623. As is discussed more fully above, analysis of those factors weighs against it being reasonable to subject West Outbound to jurisdiction in California.

## V. California cannot be the forum state as to the later-added Respondents, who are not subject to personal jurisdiction in California.

As stated above, Jackson added West Corp., Garza, and Providence as defendants after the case was transferred to Texas. It is beyond cavil that California lacked personal jurisdiction over the remaining defendants: West Corp., Garza, and Providence. None make telemarketing calls to California residents (the basis Jackson claims for general jurisdiction over West Outbound), and their specific contacts with California are minimal. Further, particularly as to Garza and his local San Antonio real estate business Providence, it would be unreasonable to subject them to jurisdiction in California. Thus, even if

jurisdiction had been proper in California as to West Outbound, it is not proper as to the later-added defendants, and California could not remain the forum state as to them.

If a case is transferred from a court where there is no personal jurisdiction over a defendant, the law of the transferee state applies:

> Thus whenever the original venue is improper, so that transfer is under § 1406(a), the transferee court should apply whatever law it would have applied had the action been properly commenced there. But although a change of venue under § 1404(a) is ordinarily only a change of courtrooms and not a change of law, so that after transfer the same law is applied as would have been applied in the transferor court, the result must be otherwise if the action was commenced in a district where venue was proper but personal jurisdiction cannot be obtained. *Plaintiff can have the benefit of the rules of law that would have been applied in the forum where he originally brought suit only if that forum was a proper one in terms both of venue and jurisdiction.* The transferee court must apply its own law whether a transfer from a court where personal jurisdiction was lacking purports to rest on § 1406(a) or § 1404(a).

Charles A. Wright, FEDERAL PRACTICE AND PROCEDURE, § 3827 (emphasis added). Because there would not have been personal jurisdiction over the later-added Respondents in California, California cannot be the forum state as to them.

It is immaterial that West Corp., Garza, and Providence were added as defendants in Texas and were not actually forced to litigate physically in California. As Jackson claims, if California is treated as the forum state after the transfer, then there is "but a change of courtrooms," and all Respondents are subjected to California law. Essentially, then, the later-added Respondents are haled into California court even though there would be no personal jurisdiction over them in California. Such a result would violate their due process rights. *See International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (due process demands that defendant not be subject to suit in a state absent meeting standard for personal jurisdiction).

## VI. Summary judgment would have been proper on Jackson's claims on the merits.

The district court granted summary judgment on limitations as to some of Jackson's claims, and on substantive grounds as to the remaining claims. In addition to affirming the limitations summary judgment, the Fifth Circuit affirmed the summary judgment on substantive grounds as to Jackson's fraud claim. Appendix A at 10a. Respondents had moved for summary judgment on substantive grounds as to all claims, however, so judgment against Jackson was proper even if limitations was not a proper grounds for judgment.

A quick survey of some of Jackson's claims illustrates that summary judgment against them was inevitable on substantive grounds. For example, any claim under the Texas Deceptive Trade Practices Act would fail because

the statute exempts transactions that involve consideration over $500,000. TEX. BUS. & COM. CODE ANN. § 17.49(g) (West Supp. 1999). Jackson's claim for conversion fails because, under Texas law, one cannot convert intangible rights, such as Jackson's claimed "trade secrets" in the bids to the RTC. *W. G. Pettigrew Distributing Co. v. Borden, Inc.*, 976 F. Supp. 1043, 1057 (S.D.Tex. 1996), *aff'd*, 127 F.3d 34 (5th Cir. 1997). The claim for tortious interference fails because Respondents were privileged to compete for the business of purchasing the properties. *See, e.g., Barker v. Brown*, 772 S.W.2d 507, 511-12 (Tex. App. – Beaumont 1989, no writ). Any claim for breach of fiduciary duty or breach of a duty of good faith and fair dealing fails based on the Fifth Circuit's ruling that Respondents did not owe Jackson such a duty. Appendix A at 10a-11a. The claim for misappropriation of trade secrets fails because Respondents did not breach any confidence or duty by learning of the information. *See Sheets v. Yamaha Motors Corp., U.S.A.*, 849 F.2d 179, 183 (5th Cir. 1988) (asserting that disclosure of trade secret to one who has no obligation of confidentiality extinguishes property right in trade secret); *Phillips v. Frey*, 20 F.3d 623, 627 (5th Cir. 1994).

Thus, any relief this Court might give Jackson from the statute of limitations would be illusory, as the Fifth Circuit on remand would affirm the summary judgment against Jackson on substantive grounds.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 01-167

IN THE

# Supreme Court of the United States

GLENN K. JACKSON and ELSIE JACKSON,

*Petitioners,*

*v.*

WEST TELEMARKETING CORPORATION, WEST TELEMARKETING CORPORATION OUTBOUND, STEVEN GARZA, and PROVIDENCE COMMERCIAL REAL ESTATE SERVICES, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## REPLY BRIEF

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Petitioners file this reply to new points raised by respondents, and respectfully urge this Court to grant the petition for a writ of certiorari.

## I. Jackson did not waive his contention that California should be the forum state.

Respondents contend that Jackson waived his contention that California should be the forum state in a choice of law analysis. They correctly state the general rule that an appellate court usually does not give consideration to issues not raised below. This rule, however, is inapplicable in this case for three reasons.

First, waiver was not the basis for the Fifth Circuit's decision. *See Jackson*, 245 F.3d 518, 522 (5th Cir. 2001). Second, the choice of law issue was raised before the district court. Jackson always contended that California law should apply in this case. Granted, Jackson did not pointedly address whether Texas versus California *choice of law* principles should apply, but both parties extensively briefed whether Texas versus California law should apply. To preserve a choice of law issue for appeal, a party needs only to timely notify the court of the applicability of another state's law. *E.g., Jaurequi v. John Deere Co.*, 986 F.2d 170, 173 (7th Cir. 1993).

Jackson did not take any action inconsistent with his argument that California law should apply. When they addressed this issue before the Fifth Circuit, respondents cited portions of Jackson's trial-court briefs for the proposition that Jackson "conceded" Texas choice of law rules apply. However, the briefing they cited was merely statements made *arguendo* that even under Texas choice of law rules, California law should apply to the merits of the case. The same position was asserted in the court of appeals. Therefore, the waiver doctrine does not

bar Jackson from complaining on appeal that the district court applied the wrong choice of law rules.

Third, even if the issue were not artfully briefed enough to be deemed "raised" before the trial court, this Court can and should address it in this appeal. The waiver rule is not one of jurisdiction, but discretion. *Singleton v. Wulff*, 428 U.S. 106, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976). A court of appeals has broad discretion to consider choice of law issues not raised in the district court in the interest of justice. *Id.*; *Booking v. General Star Management Co.*, 254 F.3d 414, 418, 419 n.4 (2d Cir. 2001); *Massachusetts Bay Ins. Co. v. VIC Koenig Leasing, Inc.*, 136 F.3d 1116, 1122 (7th Cir. 1998). A choice of law analysis, characterized as a purely legal issue, is of crucial importance because, as here, it is often outcome determinative. *Booking*, 254 F.3d at 419; *Massachusetts Bay*, 136 F.3d at 1122 (citing *Ruiz v. Blentech Corp.*, 89 F.3d 320, 324 (7th Cir. 1996), *cert. denied*, 519 U.S. 1077, 136 L. Ed. 2d 677, 117 S. Ct. 737 (1997)).

The failure to address the issue of whether the transfer was effected under § 1404(a) or 1406(a) in this case, based on the waiver doctrine, would result in manifest injustice. The motion to transfer was respondent's motion, not Jackson's. Jackson consistently argued that California law should apply, and he argued that result would obtain even under respondents' argument that Texas choice of law rules should apply. In the end, because the California district court did not render an order that specified the basis for the transfer, a California resident who suffered harm in California was denied his claim based on a repealed Texas statute of limitations when the bulk of the events giving rise to his claim did not even occur in Texas. Under these circumstances, this Court can and should address the transfer and choice of law issue. The court of appeals did. *Jackson*, 245 F.3d at 522.

Respondents also cite *Martin v. Stokes*, 623 F.2d 469, 474-75 (6th Cir. 1980) as support for their argument. In *Martin*, the plaintiff filed a diversity suit in federal district court in Virginia against Kentucky defendants over an automobile accident that occurred in Kentucky. The court transferred the case to a Kentucky federal district court, but did not specify whether the basis for the transfer was 28 U.S.C. § 1404(a) or 1406(a). The Kentucky court applied a Kentucky state statute of limitations and dismissed the cause. The plaintiff appealed, arguing the Kentucky court should have applied Virginia state law. The court of appeals held that the proper resolution of the choice of law issue depended upon whether the Virginia federal district court had personal jurisdiction over the defendants. *Martin*, 623 F.2d at 474-75. The court of appeals remanded the case for further proceedings and a determination of the jurisdictional issue. *Id.* at 475. Thus, *Martin* has nothing to do with waiver. It stands only for the proposition that to the extent the existence of personal jurisdiction is relevant to whether a transfer is effected under § 1404(a) as opposed to § 1406(a), a remand is appropriate if the jurisdictional issue is undecided at the district-court level.

## II. Under California choice of law principles, California law should have been applied.

Respondents next argue that even if the district court had applied California choice of law principles, Texas substantive law would have been applied. That argument has no merit.

California courts generally follow a three-step "governmental interests" approach in analyzing choice of law issues. First, they determine the applicable rule of law in each potentially concerned state, to see whether it really differs from California law (thus avoiding "false" conflicts). Second, they determine what interest, if any, each state has in having its law

applied in the particular case. Finally, if the law is different and if each state has an interest in having its laws applied (a "true" conflict), they select the law of the state whose interests would be more impaired if another state's law were applied. *E.g., Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 128 Cal. Rptr. 215, 546 P.2d 719 (1976), *accord, Industrial Indemnity Co. v. Chapman & Cutler*, 22 F.3d 1346 (5th Cir. 1994) (applying California law). California does not disregard the factors stressed by the Second Restatement § 6 (which Texas courts must apply), but examines them with the primary objective of ensuring that application of the law in the particular context serves the purposes for which the law was created. *E.g., Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc.*, 14 Cal. App. 4th 637, 645 (Cal. Ct. App. 1993).

Application of California's choice of law rules would lead to the application of California substantive law in this case. First, the applicable rules of law in California and Texas differ in important respects. For example, California, along with forty-two other states, applies the Uniform Trade Secrets Act, 14 U.L.A. 437. On the other hand, only eight states, of which Texas is one, continue to rely on common law to protect trade secrets. More important, Texas and California had different statutes of limitations for trade secret claims at the time Jackson filed his claims. California had a three-year limitations statute. *See* Cal. Civ. Proc. § 343 (2001). Texas, on the other hand, had a two-year statute. *See Computer Assoc. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 458 (Tex. 1994).

Because there are significant conflicts between the laws of the two states, under California's conflicts analysis a court must examine the two states' interests in having their laws applied. Jackson has already, in his Petition for Writ of Certiorari, detailed some of the interests California has in having its laws applied here. Furthermore, Jackson there explained why Texas

does not have a strong interest in having its laws applied in this case (primarily because Texas had changed its statute of limitations for trade secret claims to match California's by the time of the transfer). *See* Petition for Writ of Certiorari at 18. In sum, Texas's interest in the real estate in San Antonio does not overshadow California's interest in protecting its citizen who has been injured in California. This is especially true in light of the facts that the events giving rise to Jackson's claims occurred in several states, and that Jackson's claims focus on the misappropriation of his confidential *bid*, not the real property in Texas. Any claim impacting title to the real property was disclaimed below.

Respondents contend that a forum selection clause between the parties dictated that Texas law would govern. That is incorrect. The forum selection clause did not pertain to the Phase I transaction at all. Indeed, Jackson was not even a party to the Phase I transaction, and did not sign any contracts respecting it. Respondents wholly fail to address this fact. The forum selection clause upon which respondents rely appeared in a contract concerning the Phase IV transaction, and the bulk of Jackson's claims are not based on that contract. Rather, Jackson's claims are based in tort, equity, and statutory principles not covered by the forum selection clause. Respondents do not address this fact either. Viewed properly, Jackson's claims should have been adjudicated in accordance with California substantive law, especially under California choice of law rules.

## III. The Fifth Circuit's decision does conflict with *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988) and other circuit decisions.

Respondents correctly construe this Court's decision in *Stewart* to say transfers may be had under § 1404(a) when venue is proper in the original court, and they correctly point out that transfers from an improper venue may be had under § 1406(a). But respondents further read *Stewart* to mean that whenever a defendant even *alleges* venue is improper in the plaintiff's chosen forum, § 1406(a) must apply.

Respondents' extrapolation is not supported by the *Stewart* opinion. The relevant portion of the opinion simply states that the parties *did not dispute* whether the chosen forum was a proper venue. *Stewart*, 487 U.S. at 29 n.8. It does not say that the lack of a dispute over venue was a basis for this Court's holding that transfers based on forum selection clauses are governed by § 1404(a). *Stewart* holds that a forum selection clause does not invalidate other venues that meet the federal venue statutes, and when venue is proper under those statutes, a transfer to another venue based on a forum selection clause is governed by § 1404(a).

The courts below erroneously applied these holdings in this case. Respondents argued to the California district court that venue was improper *because of the existence of a forum selection clause*. *Jackson*, 245 F.3d at 522. They did *not* argue that venue was improper under the general venue statutes. Respondents argued a transfer was appropriate, based upon the forum selection clause, under either § 1404(a) or 1406(a). The California district court transferred the case "based upon the forum selection clause." Although the court did not expressly find that venue was improper, nor did it state the statutory ground for its ruling, there is only one logical conclusion based on the

pleadings. That is, the California district court transferred the case because it thought the forum selection clause rendered Texas a more appropriate venue.

The Fifth Circuit assumed the California district court had found venue lacking, but wrongly jumped to the conclusion that this unjustified, assumed finding automatically rendered § 1404(a) inapplicable. *Jackson*, 245 F.3d at 522. The court of appeals erred because it failed to recognize the faulty basis for its unjustified assumption — that venue was lacking solely because the forum selection clause existed — a conclusion that violates the holding in *Stewart*. The Fifth Circuit could have and should have independently evaluated whether venue was proper under 28 U.S.C. § 1391. That is the only way, absent remand, to resolve the issue of whether a transfer was appropriate under § 1404(a) or 1406(a).

The Fifth Circuit's approach directly conflicts with that of other courts. For example, in *Jumara v. State Farm Ins. Co.*, 55 F.3d 873 (3d Cir. 1995), the court of appeals noted that neither party had argued 28 U.S.C. § 1391 as a basis for venue before the trial court, but went on to hold for the first time on appeal that venue was proper in the plaintiff's chosen forum based upon § 1391(c). Furthermore, the court in *Blue Ash Development, Inc. v. Polan*, 1996 U.S. App. LEXIS 1438 *4 n.1 (6th Cir. Jan. 2, 1996), reached a different result from the Fifth Circuit by pointing out that "It does not appear under [*Stewart*] that a forum selection clause makes the venue 'wrong' " when the action is filed in a district other than that specified in the clause.

In his Petition for Writ of Certiorari, Jackson has already detailed the reasons venue was proper in California under 28 U.S.C. § 1391. Because Jackson brought his claims in a proper venue, the California district court could not transfer

those claims based on a forum selection clause without relying upon § 1404(a). This Court should clarify the law on this issue.

## IV. Respondents' personal jurisdictional arguments are irrelevant to the issue on appeal.

Respondents cite authority for the proposition that even if venue is proper in the original forum, but personal jurisdiction is lacking there, the original forum cannot remain the forum, the case may be transferred only under § 1406(a), and the law of the transferee forum must apply. This argument fails for several reasons.

First, there is authority for the proposition that § 1406 can never apply to a case removed to federal court based on diversity when personal jurisdiction was lacking in the state court. *Grimes v. Hull-Dobbs, Inc.*, 154 F. Supp. 151, 152 (E.D. Ky. 1957); 3 A.L.R. Fed. *Improper Venue — Transfer of Case* 467, § 4 (1970). If that authority is correct, there can be no disagreement that the courts below were wrong, under respondents' theory of lack of jurisdiction in California.

There is also, however, authority for the proposition that § 1406 *can* apply to a removed diversity case even if there was no jurisdiction in the state court. *Bentz v. Recile*, 778 F.2d 1026, 1027 (5th Cir. 1985). But even if that is the law, it is not clear that the issue of whether personal jurisdiction exists answers the question of whether a transfer must be accomplished under § 1404(a), § 1406(a), or some other provision. This Court has held that § 1406(a) is broad enough to authorize a transfer whether the court in which the case was filed had personal jurisdiction over the defendants or not. *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 82 S. Ct. 913, 8 L. Ed. 2d 39 (1962). But it is also the rule that § 1404(a) authorizes transfers when personal jurisdiction is lacking. *Bentz*, 778 F.2d at 1027; *Rich v. Southern Gulf Operators*, 879 F. Supp. 49 (E.D. Tex. 1995);

15 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 3827 (1986) (collecting cases). Thus, the issue of personal jurisdiction does not answer the relevant question — was the transfer made under § 1406(a) or 1404(a)?

There is yet another reason respondents' argument fails. That is, they did not plead for a transfer under § 1406 based on a lack of personal jurisdiction. They only asked for a dismissal under § 1406 on that ground. Their transfer arguments were premised solely upon the existence of a forum selection clause and its purported effect on the propriety of venue. Despite respondents' arguments before the California district court, that court did not dismiss the case. Instead, it transferred the case "based on the forum selection clause." Respondents' argument reduces to the proposition that the California court did something no party asked it to do, and did not disclose its sua sponte decision to the parties.

Nor was personal jurisdiction lacking. West Outbound was subject to personal jurisdiction because, as explained in Jackson's Petition for Writ of Certiorari (and in more detail in briefing before the California district court), West is a telemarketing company that actively seeks new clients in California and does hundreds of thousands of dollars of business annually for its existing California clients. As for the other defendants, the record does not show one way or the other whether they were subject to personal jurisdiction, because they were not joined until after the transfer and the issue was never raised. The respondents who were joined in the suit after it had been transferred are making their due process challenge to the application of California law for the first time in their Brief in Opposition.

But Jackson did establish that all the defendants "aimed" their wrongful conduct at California. In tort cases, jurisdiction

may attach if the defendant's conduct is aimed at or has an effect in the forum state. *E.g., Panavision International, L.P. v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998) (citing *Calder v. Jones*, 465 U.S. 783, 79 L. Ed. 2d 804, 104 S. Ct. 1482 (1984)). Under this "effects doctrine," personal jurisdiction can be based upon: "(1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered — and which the defendant knows is likely to be suffered — in the forum state." *Panavision*, 141 F.3d at 1321 (citing *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1486 (9th Cir. 1993)). The record shows that all the conduct of all the named defendants satisfies this test. The theft of California trade secrets, causing damage to Californians in California, is the gravamen of this lawsuit. Like a foreign hacker attacking data in a California computer, respondents' unlawful conduct was squarely aimed at California.

## V. Summary judgment was not inevitable against Jackson on the merits of his claims.

Finally, respondents essentially contend that the errors below were harmless because summary judgment would have been proper on Jackson's claims on the merits. Their entire argument on this point is based on the application of Texas law. Obviously, this argument is irrelevant if California law applies, as Jackson has always urged and continues to urge. Indeed, that is what Jackson's Petition for Writ of Certiorari is all about.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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